TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 784

CHARLES N. BEVAN, APPELLANT,

vs.

DAVID M KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED MARCH 16, 1933

(37,481)

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[fol. 1] Return of clerk omitted in printing.

[fol. 2] **IN SUPREME COURT OF OHIO**

No. 23652

Ex Parte C. N. Bevan, Plaintiff-in-error

Petition for Appeal from the Supreme Court of Ohio to the Supreme Court of the United States—Filed Feb. 10, 1933

To the Chief Justice of the Supreme Court of Ohio:

The petitioner, Charles N. Bevan, appearing herein as C. N. Bevan, is the plaintiff-in-error in the above entitled case.

On the fourteenth day of June, 1932, petitioner commenced his suit in the Court of Appeals for Lucas County, Ohio, seeking his discharge from imprisonment by the Sheriff of Lucas County, Ohio, under an order of commitment issued by one William Purcell, a notary public, for an alleged contempt of said notary occurring during an attempt to take depositions before said notary public in a certain action, entitled "Clara Sielcken-Schwarz, plaintiff, v. The Woolson Spice Company, et al., defendants", numbered 131925 on the docket of the Common Pleas Court of Lucas County, Ohio. Final judgment was rendered against the petitioner by said Court of Appeals and by said judgment he was remanded to the custody of said Sheriff, the respondent herein.

After said judgment the petitioner filed his petition-in-error in this cause in the Supreme Court of Ohio, seeking a reversal of the said judgment of the said Court of Appeals; and, after hearing, the Supreme Court of Ohio, on January 25th, 1933, made and entered its final decision and judgment herein affirming the judgment of the said Court of Appeals.

The Supreme Court of Ohio is the highest court of the State of Ohio in which a decision could be had in said suit, and its said judgment is final.

In this suit there is drawn in question the validity of certain statutes of the State of Ohio, viz., Ohio General Code Sections 11510, 11511 and 11512, on the ground that they and each of them, and the operation of said sections and each of them, as applied to the facts in this case, deprive [fol. 3] the petitioner of liberty and property without due process of law and are repugnant to the Constitution of the United States, and particularly to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the decision of the Supreme Court of Ohio is in favor of their validity.

There is also drawn in question in this suit the validity of certain other statutes of the State of Ohio, viz., Ohio General Code Sections 11497, 11503 and 11514, on the ground that they and each of them and the operation of said sections and each of them, as applied to the facts in this case, likewise deprive the petitioner of liberty and property without due process of law and are repugnant to the Constitution of the United States and particularly to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the decision of the Supreme Court of Ohio is in favor of their validity.

Manifest error has occurred, to this petitioner's prejudice, as shown herein and in the assignment of errors filed herewith, in which are more fully set out the errors complained of.

In accordance with the Rules of the Supreme Court of the United States (Rule 46, par. 2) the petitioner respectfully shows that this case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Stat. 54; 28 U. S. C. A. Sec. 861 (a)) was passed, viz., under 28 U. S. C. A. Section 344, a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

Wherefore petitioner prays for the allowance of an appeal from said Supreme Court of Ohio to the Supreme Court of the United States, in order that the decision and judgment of the Supreme Court of Ohio may be examined and reversed and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of Ohio, may be sent to the Supreme Court of the United States, as provided by law.

Petitioner, desiring the appeal to be a supersedeas, also [fol. 4] prays that an order be made fixing the amount of security which petitioner as appellant, shall give and furnish upon said appeal, and that upon the giving of said security, all further proceedings in this court be suspended and stayed, and the supersedeas granted by this court to the judgment of the Court of Appeals of Lucas County, Ohio, remain in force until the determination of said appeal by the Supreme Court of the United States.

George D. Welles, Crary Davis, Attorneys for Petitioner. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

[fol. 5] [File endorsement omitted.]

[fol. 6] IN SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Feb. 10, 1933

Plaintiff in error, Charles N. Bevan, who brought this suit under the name of C. N. Bevan and who will be hereinafter referred to as the appellant, in connection with and as a part of his petition for an appeal herein to the Supreme Court of the United States, assigns the following errors in the record and proceedings in this case upon which he will rely upon said appeal:

First. The Supreme Court of Ohio erred in affirming the judgment of the Court of Appeals of Lucas County, Ohio, and in refusing to reverse the judgment of said court.

Second. The Supreme Court of Ohio erred in not finding and adjudging that this appellant was wrongfully and illegally imprisoned without due process of law, in violation of his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in not ordering appellant discharged.

Third. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11503, 11510, 11511 and 11512 and each of them, and the operation of such sections and each of them as applied to

the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty, or property, without due process of law".

[fol. 7] Fourth. The Supreme Court of Ohio erred in holding that the General Assembly of Ohio did not violate any provision of the Federal Constitution in the enactment of Ohio General Code Sections 11510, 11511 and 11512, and in not finding and adjudging that said sections and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty or property, without due process of law".

Fifth. The Supreme Court of Ohio erred in finding and adjudging that Ohio General Code Section 11514, which provides that a witness imprisoned by an officer under Ohio General Code Sections 11510, 11511 and 11512, may, after being imprisoned, apply to a judge of the Supreme Court, Court of Appeals, Common Pleas or Probate Court, of Ohio, who may discharge such witness if it appears that his imprisonment is illegal, affords due process of law to the appellant, who was committed by a notary public under said Sections 11510, 11511 and 11512 and erred in not holding that said Sections 11510, 11511 and 11512 construed together with Section 11514, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment to the Constitution of the United States which provides that no state "shall deprive any person of life, liberty, or property, without due process of law".

Sixth. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511, 11512 and 11514 and each of them are constitutional and do not deny the appellant due process of law, and erred in not finding and adjudging that said sections and each of them are in conflict with and violate the provisions of Section 1 of the Four-[fol. 8] teenth Amendment to the Constitution of the United States and are null and void, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty or property, without due process of law", in that (a) such sections as construed by the Supreme Court of Ohio, purport to authorize and empower a notary public in the course of the taking of depositions, at will to commit and imprison a witness, who under the law of Ohio may lawfully refuse to give evidence not pertinent to the issues made or tendered by the pleadings, for contempt in failing or refusing to appear and answer questions or produce documentary evidence, without conferring upon such notary public, or upon any judicial tribunal, the power judicially to hear and determine, before the commitment and imprisonment of the witness, the question of the materiality, relevancy and competency of the evidence demanded and the guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral action brought by the witness after his imprisonment, and in which he assumes the burden; and in that (b) no opportunity is afforded by said sections, or by the law of Ohio, for submitting fundamental questions arising under the Constitution of the United States and as to the jurisdiction of the notary public to the determination of a competent judicial tribunal before the witness is declared to be guilty of contempt and imprisoned by the order of the notary public.

Seventh. The Supreme Court of Ohio erred in not finding and adjudging that the operation of Ohio General Code Sections 11510, 11511 and 11512 and each of them as applied to the facts of this case, is in conflict with and violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, contravening that part of said amendment which provides that no state shall

"deprive any person of life, liberty or property, without due process of law", in that no provision is made by said [fol. 9] sections or by the law of Ohio for a hearing by the notary public, before whom depositions are being taken for use in a civil cause pending in a state court, before such notary finds and adjudges, or attempts to find and adjudge, a person to be guilty of contempt and commits such person to jail, or for a notice of such hearing to one charged with having been guilty of contempt, and no opportunity is afforded to persons so charged to appear and defend in person or by counsel, and in that said sections provide, or attempt to provide, that the notary public might commit this appellant for contempt, without notice of any hearing to this appellant, and without providing or affording an opportunity for this appellant to be present at a hearing and to defend in person or by counsel, before finding and adjudging said appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail of Lucas County, Ohio, and in that in this case the notary public did not in fact give appellant any notice of any hearing, or afford to appellant an opportunity for him to be present at a hearing and defend in person or by counsel, before finding and adjudging appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail of Lucas County, under which order appellant was wrongfully arrested and confined by the defendant in error (appellee).

Eighth. The Supreme Court of Ohio erred in not finding and adjudging that the attempted adjudication by the notary public, before whom depositions were being taken for use in a civil cause pending in a state court, that any questions propounded to appellant and any books, papers or documents ordered to be produced by him were material to any issue in the case in which it was attempted to take said depositions, and the attempted adjudication that appellant was in contempt, and the issuing of an order of commitment, all in the absence of the appellant and without notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of appellant's rights under Section 1 of the Fourteenth Amendment to the Con- [fol. 10] stitution of the United States and were null and

void, contravening that part of said amendment which provides in part that no state "shall deprive any person of life, liberty, or property, without due process of law".

Ninth. The Supreme Court of Ohio erred in not holding that appellant has, without due process of law and in violation of his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, been unlawfully deprived of his liberty in actual fact by reason of an order given by one of counsel for a party in a civil cause in the Court of Common Pleas of Lucas County, Ohio, to a Notary Public and carried into effect by such notary public, who had been employed by such counsel for the purpose of enabling such counsel to engage in an unreasonable search and seizure of books, papers and records in appellant's possession and that by express direction of such counsel said unlawful commitment was made by said notary public without judicial hearing of any kind, and that appellant was in fact deprived of his liberty by the acts and orders of such counsel, pretending to comply with the form of law through the use of the signature of said notary public on the order of commitment.

Tenth. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11510, 11511 and 11512 and each of them, and the operation of said sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of the Fourteenth Amendment of the Constitution of the United States in that they attempt and purport to confer on notaries public arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to order or to refuse to order that questions propounded to witnesses be answered or that books, papers and documents be produced, and to commit or to withhold commitment as for contempt of witnesses who refuse to answer questions propounded to them and ordered to be answered by said notaries public or to produce books, papers or documents ordered to be [fol. 11] produced by said notaries public, without regard to the materiality, relevancy or competency of such questions or such books, papers or documents.

Eleventh. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11503,

11510, 11511, and 11512, and each of them are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that they attemp to confer upon notaries public who, under the laws of Ohio are ministerial executive officers vested with no power to hear and determine, the peculiarly and inherently judicial power to imprison summarily as for alleged contempt of them occurring in their presence, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

Twelfth. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511 and 11512 and each of them, and the operation of said sections and each of them as applied to the facts in this case do not deny this appellant due process of law and are not unconstitutional, repugnant to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that as construed by the Supreme Court of Ohio, said sections purport to authorize and permit the commitment and imprisonment of this appellant by a notary public who as in this case was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the said notary public's compensation being by law directly governed by the extent of the evidence the witness (this appellant) might be required to give, and the said notary public having a direct, substantial, personal pecuniary interest in the taking of the deposition and in coercing the witness (this appellant) to testify; and in that the said notary public was thereby disqualified from determining whether this petitioner was guilty of contempt for failing or refusing to give the evidence demanded and disqualified from ordering this appellant committed.

[fol. 12] Thirteenth. The Supreme Court of Ohio erred in not finding and adjudging that the notary public ordering appellant's commitment had a direct, substantial, personal pecuniary interest in the taking of appellant's depositions for use in a civil cause pending in a state court, and in attempting to coerce and compel appellant to testify

and to produce the books, papers and documents referred to in the order of commitment issued by said notary for this appellant and in finding and adjudging this appellant guilty of contempt and issuing said order of commitment, and in not finding and adjudging that said notary public was disqualified and without jurisdiction so to act and adjudge by reason of the fact that said notary was selected, employed and paid by the plaintiff in the alleged pending suit in which it was attempted to take appellant's deposition, said alleged judgment and order of commitment being made at the request of the plaintiff in said alleged pending suit, and said notary public's employment being upon such terms that its extent and continuance and his continued compensation and the amount thereof were contingent upon and directly governed by procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and order of commitment, so that said notary public's acts in so adjudging and bringing about the appellant's commitment and detention were a denial of due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and were null and void, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty or property without due process of law".

Fourteenth. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11503, 11510, 11511 and 11512 and each of them, and the operation of such sections and each of them, as applied to the facts in this case are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to [fol. 13] the Constitution of the United States and are null and void, in that they deprive the appellant of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty or property without due process of law."

Fifteenth. The Supreme Court of Ohio erred in holding that the Court of Appeals of Lucas County, Ohio, likewise did not err in holding as stated in each of the foregoing

assignments of error numbered Second to Fourteenth inclusive.

Wherefore the petitioner prays that the said judgment of the Supreme Court of Ohio, dated January 25th, 1933, in the above entitled cause be reversed and that judgment be rendered in his favor.

Dated February 10th, 1933.

George D. Welles, Crary Davis, Counsel for Appellant. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

[fols. 14-22] [File endorsement omitted.]

[fol. 23] IN SUPREME COURT OF OHIO

No. 23652

Ex Parte C. N. BEVAN, Plaintiff-in-error

ORDER ALLOWING APPEAL—Filed Feb. 10, 1933

The plaintiff-in-error and appellant, Charles N. Bevan (appearing herein as C. N. Bevan) having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of Ohio on the 25th day of January, 1933, and from each and every part thereof, and having presented and filed his petition for appeal, assignment of errors, prayer for reversal and his statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the said judgment of the Supreme Court of Ohio, all pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now hereby ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of Ohio in the above entitled cause as provided by law, and it is further ordered that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record, proceedings and judg-

ment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within forty days of this date.

It is further ordered that said appellant shall give good and sufficient security in the sum of $1,000.00, that said appellant shall prosecute said appeal to effect and if said appellant fail to make his plea good, he shall answer all damages and costs; that upon the appellant's giving said security, the appeal shall operate as a supersedeas and stay [fol. 24] of execution and other proceedings under said judgment of the Supreme Court of Ohio pending such appeal and appellant shall be enlarged pending such appeal.

Dated February 10, 1933.

Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio. —— ——, Associate Justice of the Supreme Court of the United States.

[fol. 25] [File endorsement omitted.]

[fols. 26 & 27] Citation, in usual form, showing service on David M. Krieger et al., filed February 16, 1933, omitted in printing.

[fol. 28] IN SUPREME COURT OF OHIO

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD ON APPEAL—Filed March 3, 1933

It is hereby stipulated by and between counsel for the appellant, C. N. Bevan, and counsel for the appellee, David M. Krieger, as Sheriff of Lucas County, Ohio, that the Clerk of the Supreme Court of Ohio shall make a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause and shall include in such transcript of record the following and no other papers and exhibits:

1. Title page and caption;

2. Petition-in-error filed in the Supreme Court of Ohio on June 24, 1932, and Entry of Appearance by defendant-in-

error, filed with the Clerk of the Supreme Court of Ohio, on June 25, 1932;

3. Transcript of Docket and Journal Entries in Court of Appeals, Lucas County, Ohio, filed with the Clerk of the Supreme Court of Ohio on July 23, 1932;

4. The pleading which bears title "Petition for Writ of Habeas Corpus", filed in Court of Appeals, Lucas County, Ohio, on June 14, 1932, (which pleading appellant claims to be a petition for Writ of Habeas Corpus and appellee claims to be an Application for Discharge from Imprisonment under O. G. C. Sec. 11514); together with Exhibits attached to said petition, said Exhibits being the Subpœna Duces Tecum which was served upon this appellant, C. N. Bevan, and the order of commitment of this appellant, C. N. Bevan;

5. The pleading bearing the title "Amendment to Petition for Writ of Habeas Corpus", filed in Court of Appeals, [fol. 29] Lucas County, Ohio, on June 15, 1932, (which pleading appellant claims to be an amendment to his Petition for Writ of Habeas Corpus and appellee claims to be an Amendment to an Application for Discharge from Imprisonment under O. G. C. Sec. 11514); together with Exhibit A, attached thereto, which Exhibit A is the petition filed in the Court of Common Pleas, Lucas County, Ohio, in case entitled "Clara Sieleken-Schwarz, New York, plaintiff, v. The Woolson Spice Company, et al., defendants."

6. Writ bearing the title "Writ of Habeas Corpus" filed with the Clerk of said Court of Appeals, Lucas County, Ohio, on June 15, 1932, (which writ appellant claims to be a Writ of Habeas Corpus and appellee claims to be a writ issued upon an Application for Discharge from Imprisonment under O. G. C. Sec. 11514), together with the Sheriff's Return thereto; the Commitment papers attached to said return to be shown only by incorporating, by reference, the "Order of Commitment" attached as an Exhibit to the Pleading (referred to in paragraph numbered 4 of this Stipulation) bearing the title of "Petition for Writ of Habeas Corpus"; the Sheriff's return to said Order of Commitment to be here included in full;

7. Recognizance, filed with the Clerk of said Court of Appeals of Lucas County, Ohio, on June 17, 1932;

8. Motion for New Trial, filed with the Clerk of said Court of Appeals of Lucas County, Ohio, on June 22, 1932;

9. Bill of Exceptions, allowed by said Court of Appeals on June 23, 1932, and filed with the Clerk of the Supreme Court of Ohio on July 23, 1932; together with plaintiff's Exhibits 1, 2, 3, 3A, 3B, 3C, 4 and 6 to 11, inclusive, and defendant's Exhibits 1 to 4, inclusive. Of the foregoing exhibits, the following to be shown only by reference to the same papers in preceding pages of transcript, viz: Plaintiff's Exhibit 1 (petition in case of Clara Sielcken-Schwarz, plaintiff, v. The Woolson Spice Company, et al., defendants) by incorporating, by reference, the same paper which is attached as Exhibit A to the pleading (referred to in paragraph numbered 5 of [fol. 30] this stipulation) bearing the title "Amendment to Petition for Writ of Habeas Corpus"; Plaintiff's Exhibit 3A (order of commitment of C. N. Bevan); and Plaintiff's Exhibit 7 (subpœna duces tecum on C. N. Bevan) by incorporating, by reference, the same papers which are attached as Exhibits to the pleading (referred to in paragraph numbered 4 of this stipulation) bearing the title "Petition for Writ of Habeas Corpus"; of the foregoing Exhibits the following to be indicated only by title as follows, viz: Plaintiff's Exhibit 3B (Notary's Writ of Attachment of Robert A. Stranahan); Plaintiff's Exhibit 3C (Notary's Writ of Attachment of John W. Koehrman); Plaintiff's Exhibit 8 (Subpœna Duces Tecum served upon John W. Koehrman); Plaintiff's Exhibit 9 (Subpœna served upon Robert A. Stranahan); Plaintiff's Exhibit 10 (Notary's Writ of Attachment of Robert A. Stranahan); Plaintiff's Exhibit 11 (Opinion of the Court of Appeals of New York in the case of George C. Harrington, Administrator, v. Eugene M. Keteltas, 92 N. Y. 40); of the foregoing, Plaintiff's Exhibit 4 and Defendants' Exhibits 2 and 3 shall be abbreviated in accordance with the typewritten copies thereof submitted to you by counsel;

10. Opinion of the Court of Appeals of Lucas County, Ohio, in this cause;

11. Journal Entry filed in Supreme Court of Ohio on August 24, 1932, substituting Gilson D. Light, as Sheriff of Lucas County, Ohio, as defendant-in-error;

12. Motion for Stay of Execution and Advancement of Cause, filed in Supreme Court of Ohio, on October 15, 1932, and notice of hearing;

13. Order of Supreme Court of Ohio, entered on or about October 26, 1932, granting stay of execution;

14. Supersedeas bond filed in Supreme Court of Ohio on November 25, 1932;

15. Judgment of the Supreme Court of Ohio filed on January 25, 1932;

16. Opinion of the Supreme Court of Ohio in this cause;

[fol. 31] 17. Order of Supreme Court of Ohio substituting David M. Krieger as Sheriff of Lucas County, Ohio, as defendant-in-error nunc pro tunc, filed February 10, 1933;

18. Appellant's petition for appeal, filed herein on February 10, 1933;

19. Appellant's assignment of errors, filed herein on February 10, 1933;

20. Appellant's statement as to the basis on which he contends that the Supreme Court of the United States has jurisdiction on appeal to review the said jndgment of the Supreme Court of Ohio, filed herein on February 10, 1933;

21. Order allowing appeal and supersedeas, filed herein on February 10, 1933;

22. Appeal and supersedeas bond approved and filed herein on February 17th, 1933;

23. Statement to respondent-appellee (defendant-in-error in the Supreme Court of Ohio) re Paragraph 3, Rule 12, of the Supreme Court of the United States, and acknowledgment of service thereof, filed herein on February 10, 1933;

24. Citation upon appeal and proof of service, filed herein on February 16, 1933;

25. Stipulation as to Transcript of Record on Appeal;

26. Appellee's Statement Making Against the Jurisdiction Asserted by the Appellant, filed herein on February 24, 1933;

27. Clerk's certificate.

Said transcript to be prepared as required by law and the rules of the Supreme Court of the United States and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 22nd day of March, 1933, pursuant to the order allowing said appeal.

[fol. 32] It is further stipulated by and between the parties that the foregoing items constitute all portions of the record necessary for a determination of the questions raised on this

appeal and that no portion of the record omitted is necessary or material for a determination of such questions.

Dated March 2, 1933.

Geo. D. Welles, Crary Davis, Attorneys for Appellant. Stuart S. Wall, H. S. Bugbee, Thomas J. Lynch, of Counsel. Baker, Hostetler, Sidlo, & Patterson, Fraser, Hiett, Wall & Effler, Attorneys for Appellee. Newton D. Baker, Harold W. Fraser, Raymond T. Jackson, John C. Morley, of Counsel.

[fols. 33-60] [File endorsement omitted.]

[fols. 61 & 62] Supersedeas bond on appeal for $1,000, approved and filed February 17, 1933, omitted in printing.

[fol. 63] IN SUPREME COURT OF OHIO

[Title omitted]

PETITION IN ERROR—Filed June 24, 1932

C. N. Bevan, plaintiff-in-error (hereinafter referred to as the petitioner) says that at the May Term, 1932, of the Court of Appeals of Lucas County, Ohio, on June —, 1932, in an action for a writ of habeas corpus which originated and was therein pending, being Cause No. 2691, entitled "Ex parte, C. N. Bevan", and in which plaintiff-in-error was petitioner and Joseph Zimmerman, as Sheriff of Lucas County, Ohio, was respondent, a judgment was rendered against the petitioner.

Said case originated in said Court of Appeals and involved questions arising under the Constitution of the United States and the Constitution of Ohio.

A transcript of the docket and journal entries and the original papers in said court are filed herewith.

There is substantial error in said record, proceedings and judgment, to the manifest prejudice of petitioner, in the following and other respects:

(1) Said Court of Appeals erred in not finding and adjudging that petitioner was unlawfully deprived of his liberty, and in not discharging him.

(2) Said Court of Appeals erred in re-committing and remanding petitioner to the custody of the respondent.

(3) The finding, decision and judgment of said Court of Appeals are contrary to law.

(4) The finding, decision and judgment of said Court of Appeals are not sustained by sufficient evidence.

(5) The finding, decision and judgment of said Court of Appeals are erroneous, in that there is no evidence to sustain them.

[fol. 64] (6) Said Court of Appeals erred in not finding and adjudging that the order of commitment under which petitioner was imprisoned by the respondent was void and of no effect.

(7) Said Court of Appeals erred in not finding and adjudging that the petition of the plaintiff in the case in which it was attempted to take said depositions, viz: Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, v. The Woolson Spice Company, et al., defendants, stated no cause of action whatever and tendered no issue whatever and that no evidence attempted to be taken by said depositions, no questions asked of the petitioner, and no books, papers or documents which it was attempted to require him to produce could or would be relevant or material to any issue whatever under said alleged petition or in said alleged action, and that therefore the action of the notary public in ordering petitioner to answer any questions or to produce any books, papers or documents, and the action of the notary in attempting to adjudge that any such questions and any such books, papers and documents were material to any issue in said case, and the action of said notary in attempting to adjudge that petitioner was in contempt and in issuing a commitment for petitioner and bringing about his arrest and detention violated the provisions of Section 1 of Article I of the Ohio Constitution, and the provisions of the Fourteenth Amendment to the Constitution of the United States, and were illegal, null and void.

(8) Said Court of Appeals erred in not finding and adjudging that the petition of the plaintiff in said Case No. 131,925 in the Court of Common Pleas of Lucas County, Ohio, in which it was attempted to take said depositions, affirmatively showed that said plaintiff had no capacity or right whatever to bring or prosecute said action, or to cause the taking of any depositions at all therein, or to enforce the attendance or testimony of any witnesses or the production of any books, papers or documents, and that by reason thereof the action of said notary public in [fol. 65] ordering petitioner to answer any questions or to produce any books, papers or documents, and the action of the notary in attempting to adjudge that any such questions and any such books, papers and documents were material to any issue in said case, and the action of said notary in attempting to adjudge that petitioner was in contempt and in issuing a commitment for petitioner and bringing about his arrest and detention violated the provisions of Section 1 of Article I of the Ohio Constitution, and the provisions of the Fourteenth Amendment to the Constitution of the United States, and were illegal, null and void.

(9) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article I of the Constitution of the State of Ohio, and are null and void, in that they deprive the petitioner of his liberty and property, contravening that part of Section 1 of Article I, which provides that all men "have certain inalienable rights, among which are those of enjoying and defending liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety".

(10) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 14 of Article I of the Constitution of Ohio, and are null and void, in that they deprive the petitioner of

security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of Section 14 of Article I, which provides that the "right of the people to be secure in their persons, houses, papers and possessions against unreasonable searches and seizures shall not be violated".

(11) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of [fol. 66] such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Sections 5, 10 and 16 of Article I and Section 32 of Article II of the Constitution of Ohio, and are null and void.

(12) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of said sections and each of them as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article IV of the Constitution of Ohio in that they attempt to confer judicial power upon notaries public.

(13) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, and are null and void, in that they deprive the petitioner of his liberty and property without due process of law; contravening that part of Section 1 of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

(14) Said Court of Appeals erred in not finding and adjudging that said notary public had no jurisdiction to attempt to take said depositions or to attempt to force or require petitioner to answer any questions or produce any books, papers or documents upon the taking of said depositions or to adjudge petitioner in contempt for failing or refusing so to do, or to make or issue any order of commitment against this petitioner.

(15) Said Court of Appeals erred in not finding and adjudging that said notary public in attempting to adjudge that any questions propounded to petitioner and any books, papers or documents ordered to be produced were material or relevant and in attempting to adjudge petitioner in contempt and issuing a commitment for him, attempted to exercise judicial powers in violation of Section 1 of Article IV of the Constitution of Ohio and that all of said acts of [fol. 67] said notary were null and void.

(16) Said Court of Appeals erred in not finding and adjudging that the notary public purporting to act under said Sections 11510, 11511 and 11512, General Code of Ohio, and attempting to adjudicate that the questions asked of this petitioner which are referred to in the order of commitment issued and made by said notary, and the books, papers and documents which are also therein referred to, are material or relevant to any issue or issues in the case in which it was attempted to take said depositions, and attempting to adjudge the petitioner guilty of contempt and issuing said order of commitment and bringing about the arrest and detention of this petitioner under said order of commitment, was disqualified on account of his personal pecuniary interest in the taking of said depositions, so to adjudge and act and to commit or cause this petitioner to be committed, by reason of the fact that said notary public was employed and paid by the plaintiff in said alleged pending suit, such alleged judgment and order of commitment being made at the request of said plaintiff, and that his employment was upon such terms that its extent and continuance and his continued compensation were contingent upon procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and by such order of commitment, and that therefore said notary's acts in so adjudging and bringing about the petitioner's conviction and detention were a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States of America and were null and void.

(17) Said Court of Appeals erred in not finding and adjudging that the attempted adjudication by the notary that any questions propounded to petitioner and any papers, books or documents ordered to be produced by him,

are material to any issue in the case in which it was attempted to take said depositions, and the attempted adjudication that petitioner was in contempt, and the issuing of an order of commitment, all in the absence of the petitioner and without notice to him or to his counsel, and [fol. 68] without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of petitioner's constitutional rights under Sections 1, 5, 10, 14 and 16 of Article I, and Section 1 of Article IV of the Ohio Constitution and each of said sections, and in violation of his rights under the Fourteenth Amendment of the Constitution of the United States, and were null and void.

(18) Said Court of Appeals erred in not finding that the purported subpoena duces tecum issued by said notary was illegal and void, both on account of its general, vague and indefinite character and because it constituted an unreasonable search and seizure in violation of Section 14 of Article I of the Constitution of Ohio, and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

(19) Said Court of Appeals erred in not finding and adjudging that the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, in which it was attempted to take said depositions, was not entitled to take depositions nor did the notary public have power or jurisdiction to issue any subpoena, require any questions to be answered or books, papers or documents to be produced, for the reason that no service of summons had been made on one of the defendants in said action, viz., Marion M. Miller, nor had any service been made on the defendant Irving Trust Company, in its capacity as Executor of the Estate of Hermann Sielcken, deceased.

(20) Said Court of Appeals erred in not finding and adjudging that the attempt of the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants, to take depositions in said case was not in good faith for the purpose of securing or perpetuating any evidence material to any issue of said case or for use in the trial of said case or that it was not otherwise in good faith, but was an abuse of process.

(21) Said Court of Appeals erred in other respects apparent on the face of the record.

(22) Said Court of Appeals erred in overruling peti-
[fol. 69] tioner's motion for a new trial.

Wherefore petitioner prays that said judgment in the Court of Appeals be reversed and that he be restored to all things lost thereby.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Plaintiff-in-error.

[fol. 70] IN SUPREME COURT OF OHIO

[Title omitted]

ENTRY OF APPEARANCE—Filed June 25, 1932

The undersigned defendant-in-error and respondent waives the issuance and service of summons in error and enters his appearance herein.

Joseph Zimmerman, as Sheriff of Lucas County, Ohio. Fraser, Hiett, Wall & Effler, Counsel *for* Record for the Respondent in Court of Appeals.

6/24/32.

[fol. 71] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER SUBSTITUTING SHERIFF—Filed August 24, 1932

Upon suggestion by counsel for the petitioner, and it appearing to the court, that during the pendency of these proceedings-in-error the respondent and defendant-in-error, Joseph Zimmerman, has ceased to be Sheriff of Lucas County, Ohio, and that Gilson D. Light has succeeded said Zimmerman in said office and is now the Sheriff of Lucas County, Ohio, and with the consent of all parties, including said Gilson D. Light,

It is Ordered and Adjudged:

That said Gilson D. Light, as Sheriff of Lucas County, Ohio, is substituted as respondent and defendant-in-error herein in place of said Joseph Zimmerman, and that these proceedings-in-error proceed under their original title.

Approved.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Petitioner-Plaintiff-in-error. Baker, Hostetler, Sidlo & Patterson, Fraser, Hiett, Wall & Effler, Attorneys for Respondent-Defendant-in-error.

O. K. Gilson D. Light.

[fol. 72] IN SUPREME COURT OF OHIO

[Title omitted]

MOTION FOR STAY OF EXECUTION AND ADVANCEMENT OF CAUSE —Filed October 15, 1932

Now comes plaintiff-in-error, C. N. Bevan, and moves the court for an order staying execution of the final judgment of the Court of Appeals of Lucas County, Ohio, to reverse which this proceeding-in-error is being prosecuted, until this proceeding-in-error shall have been heard and decided by this court, and to fix the terms of such stay of execution.

Plaintiff-in-error further moves the court that, in the event his motion for a stay of execution be not granted, this cause be advanced for hearing and decision by this court on a date prior to the 25th day of October, 1932.

The foregoing motion for stay of execution is made upon the grounds that the present proceeding, which is in habeas corpus, presents substantial and important questions for determination,

(a) As to the construction of Sections 11510, 11511 and 11512, General Code, and their constitutionality both in respect to the Constitution of the State of Ohio and the Fourteenth Amendment to the Constitution of the United States;

(b) As to the disqualification of the Notary Public to issue the orders of commitment and attachment;

(c) As to whether any evidence is or could be relevant or material, or the giving of it enforced at the instance of the plaintiff in an action which the plaintiff has no right or capacity to maintain and in which her petition states no cause of action;

(d) As to whether the plaintiff in said action, in the Common Pleas Court of Lucas County, Ohio, has any right or capacity to maintain said action and whether her petition states any cause of action, which questions are raised in said Common Pleas Court by a demurrer filed by one of [fols. 73–76] the defendants in said action, which demurrer is pending and set for hearing on October 27, 1932;

(e) Other and related questions, shown by the brief of plaintiff-in-error, which questions are of general interest and importance; and upon the further grounds appearing in the attached affidavit of plaintiff-in-error in support hereof.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Plaintiff-in-error.

[fol. 77] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER GRANTING MOTION BY PLAINTIFF IN ERROR FOR STAY OF EXECUTION AND ADVANCEMENT OF CAUSE—Oct. 26, 1932

It is ordered by the Court that this motion be, and the same hereby is, Allowed.

Journal 33, Page 29.

[fol. 78] Supersedeas bond on stay for $100, approved and filed November 25, 1932, omitted in printing.

[fol. 79] IN SUPREME COURT OF OHIO, OF THE TERM OF JANUARY, A. D. 1933

No. 23652

Ex Parte C. N. BEVAN

Error to the Court of Appeals of Lucas County

JUDGMENT—Jan. 25, 1933

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same hereby is, affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended taxed at $—.

Ordered that a special mandate be sent to the Court of Appeals of Lucas County, to carry this judgment into Execution.

Journal 33, Page 90.

[fol. 80] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER SUBSTITUTING SHERIFF—Filed February 10, 1933

Upon the suggestion by counsel for the plaintiff-in-error, and it appearing to the Court, that during the pendency of these proceedings in error, viz., on January 1, 1933, defendant-in-error, Gilson D. Light, ceased to be Sheriff of Lucas County, Ohio, and that David M. Krieger has succeeded said Light in said office and is now Sheriff of Lucas County, Ohio,

It is Ordered and Adjudged:

That said David M. Krieger, as Sheriff of Lucas County, Ohio, is substituted nunc pro tunc as defendant-in-error herein in place of said Gilson D. Light.

Carl V. Weygandt, C. J.

[fol. 81] IN SUPREME COURT OF OHIO

Nos. 23652, 23653 and 23654

Decided January 25, 1933

Ex Parte BEVAN

Ex Parte KOEHRMAN

Ex Parte STRANAHAN

Error to the Court of Appeals of Lucas County

Evidence—Depositions—Judicial power not exercised by notary public committing witness for contempt—Constitutional law—Sections 11510, 11511 and 11512, General Code—Due process of law—Committed witness afforded statutory remedy—Section 11514, General Code—Relevancy or competency of testimony and privilege preserved in trial court—Right to cross-examine adverse party vests when summons served—Sections 11497 and 11526, General Code—Cross-examination authorized, although codefendant not served—Codefendant may be served, how—Section 11299, General Code—Infirmity of petition or action not ground for refusal to respond—Notary public not disqualified for interest in taking depositions—Subpœna duces tecum not unreasonable search and seizure—Entire corporate correspondence file, records and documents ordered produced—Collection of assets of corporation—Heir or legatee may maintain action, upon refusal of personal representative.

1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpœna.

2. The general assembly did not violate any provision of the federal or state constitution in the enactment of Sections 11510, 11511 and 11512, General Code, in delegating such power to notaries public. (DeCamp v. Archibald, 50 Ohio St., 618, and Benckenstein v. Schott, 92 Ohio St., 29, approved and followed.)

3. A witness committed by a notary public, under Sections 11510, 11511 and 11512, General Code, has his remedy under Section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross-examination under the statute, the further right to test the relevancy or competency of the questions and to demand his privilege, is preserved to him in the trial court.

4. The right of a party to an action to examine the adverse party as upon cross-examination under Section 11497, General Code, vests as soon as summons is served on such party as provided by Section 11526, General Code. The fact that a co-defendant has not been served with summons, does not furnish any reason why the party served should not submit to such examination, since the party plaintiff may proceed under Section 11299, General Code.

[fol. 82] 5. No ground for refusal to appear before a notary public and testify, is afforded officers of a corporation by the fact that the petition in the action, in which it is sought to take the depositions of such officers as upon cross-examination, is claimed to be demurrable, or that the action was not brought within the time provided by law, or that a party plaintiff has been guilty of laches.

6. The claim that a notary public has such an interest in the taking of depositions as disqualifies him to act, is untenable, and the case of Tumey v. Ohio, 273 U. S., 510, has no application whatever.

7. In an action charging fraudulent conspiracy by the officers of a corporation, because of the tendency toward liberality in cases of this character, the range of the testimony is wide, and subpœnas duces tecum, which command that the entire correspondence file, records and documents of such corporation for many years back, be produced before the notary public by the officers of the corporation, to be used in connection with the giving of their depositions as upon cross-examination, are not so broad and sweeping as to be violative of due process, and do not constitute unreasonable searches and seizures.

8. When a personal representative of a decedent's estate refuses to bring an action for the collection of assets, an heir, legatee or devisee may bring the action and make such personal representative a party defendant.

OPINION

These are proceedings in error to review the respective judgments of the Court of Appeals of Lucas county, Ohio, made and entered in the above-entitled cases.

An intelligent consideration of the issues involved necessitates a comprehensive statement. In order to make it comprehensive, some time and much space have been consumed.

These judgments respectively deny original applications by the plaintiffs in error for discharge from the custody of the sheriff of Lucas county. The plaintiff in error C. N. Bevan was held under a commitment issued by a notary [fol. 83] public for his refusal to answer material questions, refusal to answer any further questions of any character, and refusal to produce material books or records, pursuant to a subpœna duces tecum, in the course of the taking of his deposition in the suit of Clara Sielcken-Schwarz v. The Woolson Spice Company et al., pending in the common pleas court of Lucas county. The plaintiffs in error John W. Koehrman and Robert A. Stranahan had respectively been arrested under attachments issued by the same notary, upon their refusal to appear and give their depositions in the same case, in response to subpœnas personally served upon them.

The material facts are as follows: On June 2, 1932, Clara Sielcken-Schwarz, as widow and sole residuary legatee of the late Hermann Sielcken, filed her petition in the common pleas court of Lucas county, Ohio, against the Woolson Spice Company, an Ohio corporation, of which the plaintiff in error, C. N. Bevan, is secretary and treasurer; against plaintiffs in error John W. Koehrmann and Robert A. Stranahan; against Franklin H. Biggs, Marion M. Miller and Frank D. Stranahan; against Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William Brigham, deceased; and against the Irving Trust Company, a foreign corporation, as executor of the last will and testament of Hermann Sielcken, deceased.

The petition charges that the defendants Koehrmann and Biggs and said Brigham fraudulently conspired together to take advantage of the absence in Germany of Sielcken (president and controlling stockholder of the Woolson Company), where he had gone on the business of the company, and where he had been detained by his last illness and the exigencies of the World War, to oust Sielcken as president, and to wrongfully acquire control of the corporation and manipulate and exploit it in their own interests; that thereafter said Koehrman, Biggs and Brigham, in as- [fol. 84] sociation with Robert A. Stranahan and Frank Stranahan, aided and abetted by the Woolson Spice Company, fraudulently conspired together to acquire for a grossly inadequate price the stock formerly held by Sielcken and then held by his estate; that the fraudulent conspiracy was carried on by such individual defendants taking advantage of the control of the corporation, wrongfully acquired by them, to misrepresent the financial condition, business and prospects of the Woolson Company; that such fraudulent misrepresentations were communicated to the executor, and to all prospective purchasers of the stock; and that as a result of this wrongful and fraudulent conspiracy the individual defendants, aided and abetted by the Woolson Spice Company, obtained the stock of the Sielcken estate for a grossly inadequate price.

The petition asks to have the stock so obtained restored to the estate, together with all dividends paid thereon since its fraudulent conversion.

The petition alleges that the fraud was not discovered by the plaintiff, sole residuary legatee, until 1931, and was not discovered by the executor prior to that time. The petition further sets forth that since the executor has failed and refused to bring the suit on request of the plaintiff, such executor is therefore joined as a party defendant.

On the same day the petition was filed, summons was duly issued and served upon all of the defendants except Marion M. Miller, who could not be found within the county and who has not been served. On the same day, after service of summons, notice to take depositions on June 6, 1932, was served on the common pleas defendants, and subpœnas duces tecum were served on the witnesses, Koehrman and Bevan. No proceedings were had on this notice because prior to June 6th counsel for the common pleas plaintiff

were served with a motion to quash the notice to take depositions and the subpœnas duces tecum, and to enjoin the [fol. 85] taking of depositions. This motion came on for hearing before the common pleas court of Lucas County, Ohio, on June 6, 1932, and, at the suggestion of the court, an agreement was reached between counsel for the common pleas plaintiff and chief counsel for the common pleas defendants, and for these plaintiffs in error, that the taking of depositions should be postponed until June 13th. Pursuant to that agreement new notices to take depositions on June 13th were served on the common pleas defendants, subpœnas duces tecum upon the plaintiffs in error Bevan and Koehrman, and ordinary subpœnas upon the plaintiff in error Robert A. Stranahan and upon Frank Stranahan.

At 9:30 a. m., on June 13th, the hour fixed for taking the depositions, the witness Bevan appeared, but without any of the books and papers called for in his subpœna. The witnesses Koehrman and Stranahan disregarded their subpœnas and failed to appear. On the failure of three of the witnesses summoned to appear, and the failure of the witness Bevan, to make any compliance with his subpœna duces tecum, the notary adjourned the hearing until 2 p. m., of the same day, and ordered Bevan to produce at that time the books and records described in his subpœna. Prior to this adjourned time for the taking of these depositions a supplemental motion to quash the new notices and subpœnas, and to enjoin the taking of depositions in the common pleas suit was filed in the common pleas court. At 2 p. m., on June 13th, being the time to which the taking of the depositions had been adjourned, Koehrman and Stranahan again failed to appear. Bevan appeared and was duly sworn and proceeded to answer a few questions as to his name and occupation. He was then asked a series of questions, subsequently found to be material by the Court of Appeals for Lucas county, Ohio, and in each instance, upon being ordered to answer by the notary, he refused to do so, making no claim of privilege, and giving as his only [fol. 86] reason that he was advised by counsel not to answer. Bevan also refused to produce any of the books, records or documents required by his subpœna duces tecum. Finally Bevan stated that he would answer no further questions of any kind or character whatsoever, and he

again refused to produce any of the books, records or documents described in his subpœna duces tecum.

Thereupon the notary adjudged that said questions were material, and that said books, papers and documents were material and properly described, and issued to the sheriff of Lucas county, Ohio, a commitment directing him to arrest and commit the said witness to the county jail until he should testify. The witnesses Koehrman and Stranahan having failed and refused to appear in obedience to their subpœnas, the notary issued writs of attachment for each of them, commanding the sheriff of Lucas county, Ohio, to attach each of them and bring them before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpœna as to give his testimony in the action."

No arrests were made under the commitment or writs until 9:10 a. m., on June 14th, at which time the sheriff's office was advised by counsel for the plaintiffs in error that Bevan, Koehrman and Robert A. Stranahan were then in the Lucas county courthouse, ready to be arrested. A technical arrest was then made, and three applications for discharge from illegal imprisonment or petitions for writs of habeas corpus were immediately filed with the Court of Appeals of Lucas county, Ohio. The applications or writs were granted at once, before the sheriff had an opportunity to produce the witnesses Koehrman and Stranahan before the notary, and all were immediately released on their own recognizances, pending hearings on their applications or petitions.

Thereupon counsel for the plaintiffs in error and common [fol. 87] pleas defendants dismissed without prejudice, and without any hearing, the motion and supplemental motion to enjoin the taking of depositions in the suit which had been filed in the common pleas court.

On the morning of June 15, 1932, the plaintiffs in error filed in the Court of Appeals of Lucas county, Ohio, amendments to their respective applications or petitions, in which they raised the constitutional questions now sought to be brought before this court.

The original applications or petitions, and the amended applications or petitions, were heard by the Court of Appeals of Lucas county on June 15th and 16th, and after

hearing all evidence offered by counsel on the legality of the restraint of the respective witnesses, lengthy arguments of counsel, and the submission of briefs, that court on June 21, 1932, held that the common pleas plaintiff was entitled to take the depositions of these witnesses at once; that the subpœnas duces tecum called for material, books and papers, and were not too broad; that the questions asked the witness Bevan were material; that he was guilty of contempt for refusing to produce the books and papers; and that the witnesses Koehrman and Stranahan were legally attached for disobeying their subpœnas.

On June 22d the Court of Appeals for Lucas county, Ohio, ordered the applications dismissed and the applicants remanded to the custody of the sheriff of Lucas county. On the same day motions for a new trial in the Court of Appeals of Lucas county were overruled. Petitions in error were at once filed in this court by plaintiffs in error, and on June 25th respective applications for stays of execution were addressed to Judge Kinkade of this court. After a full hearing, Judge Kinkade overruled the applications. Similar applications were presented to the Court of Appeals of Lucas county on June 27th, and on [fol. 88] June 29th these applications for stays were likewise overruled by that court.

Messrs. Tracy, Chapman & Welles, Messrs. Marshall, Melhorn, Marlar & Martin, Mr. Harry S. Bugbee, Mr. Stuart S. Wall, Mr. Crary Davis and Mr. Thomas J. Lynch for plaintiffs in error.

Messrs. Baker, Hostetler, Sidlo & Patterson and Messrs. Fraser, Hiett, Wall & Effler for defendant in error.

STEPHENSON, J.:

These three cases were consolidated and submitted together, as the same alleged controlling questions arise in each case. There will be no further statement of fact in this opinion, other than is absolutely necessary in order to apply the law, as the court interprets it.

It is assumed that the depositions in question were being taken before a regularly appointed notary public in pursuance of notice as provided by statute, as no question was raised along these lines.

Stranahan was served with an ordinary subpœna, and Bevan and Koehrman were served with subpœnas duces tecum.

No complaint is made as to the service of the subpœnas. It is contended that the subpœnas duces tecum "were so broad and sweeping in their terms as to be violative of due process and to constitute unreasonable searches, and seizures, in addition to calling for incompetent and immaterial evidence."

As bearing upon this particular phase of the case, it is significant that no question of privilege was raised.

Stranahan and Koehrman disobeyed the order of their subpœnas and failed to appear. Bevan appeared, was sworn, answered the preliminary questions as to name and residence, refused to answer further questions, and refused to produce any of the books, records and documents described in his subpœna duces tecum, giving as his reason [fol. 89] therefor that he "was acting upon the advice of counsel," which, of itself, in a case of this character, is no reason at all. Attachments were issued and served on Stranahan and Koehrman. Brushing aside the preliminary proceedings, all three of them were arrested and committed to jail until they "should testify." Thereupon applications were made to the Court of Appeals for their release. It would be of little moment whether the application was made under favor of Section 11514, General Code of Ohio, or whether it was in the form of habeas corpus, except that the United States Circuit Court of Appeals of the Sixth Circuit has held substantially that this statute provides a method for judicial review of the action of the notary. Bevan v. Light, Sheriff (C. C. A.), 61 F. (2d) 1019.

The Court of Appeals heard the applications of all three, dismissed their petitions and they were thereupon automatically remanded to the custody of the sheriff of Lucas county; and this court is asked, in this proceeding, to reverse the Court of Appeals and discharge plaintiffs in error from custody.

Practically all the statutes empowering notaries public to take depositions and commit any one violating their lawful orders are attacked.

The administration of justice would be seriously impeded had not the General Assembly made some provision for the taking of depositions. As a part of the instrumentality for

taking depositions, the Legislature created the office of notary public and made it appointive. There was reason for this enactment. A notary public, above all officers, should not be under any obligation to the electorate of his county. A notary public is appointed by the Governor, on the certificate of the common pleas judge of the county for which he is appointed, which judge must have personal knowledge of his good moral character and his ability to [fol. 90] perform the duties of the office, or ascertain same by an examination prescribed by the rules of court.

No requirement as to fitness is required of a justice of the peace. If the individual who is a candidate for the office of justice of the peace in his township secures the greater number of votes, he is justice of the peace, regardless of fitness, and he is a judicial officer with power to "hear and determine," and undoubtedly with power to commit for contempt of his court.

Can it be said that the Legislature has no authority to delegate the power to commit to a notary public, notwithstanding his fitness, just because he has no power to "hear and determine?"

Our forebears, with uncanny wisdom, gave us the legislative, executive and judicial functions of government, and intended that they should operate as "checks and balances." During our formative period, the courts, federal and state, viewed with jealousy any attempt on the part of Congress or a state Legislature to delegate the powers inherent in one branch of government to another. Our rapid expansion made necessary the creation of many new offices and they were created, probably too many of them; but had not the courts relaxed to some extent the rule requiring the powers of government to be kept sacredly separate, we would have had many more of them.

It would not be necessary to go beyond the confines of Ohio to find scores of instances wherein one branch of government has been invested with the powers of another. This departure had to be made as a matter of public exigency.

A notary public is a ministerial officer, as that term has been understood so long that "the memory of man runneth not to the contrary." Some worth-while authorities insist

that the word "ministerial" means nothing, as applied to an officer—that our officers are legislative, executive and judicial. Under this strict nomenclature we must hold that [fol. 91] a notary public is an executive officer, clothed with such power as the Legislature, within its constitutional limitations, saw fit to delegate to him.

Is the power to commit, delegated to notaries public, a judicial function? We think not. It is so circumscribed by legislative enactment that there is little room remaining within which to exercise the only judicial function, if it by any stretch of the imagination could be called a judicial function, whether he will or will not commit.

That is not all. We are not so sure that the section under which commitment by a notary is authorized is not a mandatory statute, notwithstanding the language used is directory.

Section 11512, General Code, provides that the notary "may fine" or "may imprison" for disobedience of the order of a subpœna or for refusal to testify. While language is helpful in determining whether a statute is mandatory or directory, it is by no means conclusive. The true test is the legislative intent. What is the purpose of the statute? What did the Legislature intend that it should accomplish?

The purpose of depositions is threefold: First, to obtain the testimony of witnesses beyond the jurisdiction of the court; second, to perpetuate testimony; and, third, to operate as a bill of discovery.

The Legislature evidently sought to provide a means whereby a litigant's rights would be preserved in a case the exigencies of which would prevent him from producing his testimony in court in the regular way; to compel the production of testimony that might be forever lost; and to afford an opportunity to the litigant to secure evidence of facts necessary to make out his case, which evidence was peculiarly within the knowledge, or if documentary, in the possession and control of his adversary.

Under these enactments the litigant is entitled to these rights as a matter of law. He undertakes to assert them. [fol. 92] Notices are regularly served to take depositions of the officers of an adversary corporation. Subpœnas are regularly served. One officer appears in obedience to his

subpœna, and refuses to testify. Two other officers refuse to appear. The litigant requests the notary to fine or commit the recalcitrant witnesses under such circumstances, and the notary flatly refuses to either fine or commit—must the litigant stop here and proceed anew before another notary or can he not resort to a court of record and by mandamus compel the notary to do his duty?

The witness is given the right to have the assessment of his fine or his commitment inquired into by a court of competent jurisdiction. Is the door of the law closed to the litigant?

We are not holding Section 11512, General Code, to be a mandatory statute, as it is not necessary so to do in this case.

The plaintiff in the action in which it was sought to take these depositions was not at all modest in her demands. The subpœnas duces tecum did call for the production of a mass of testimony, but it must be remembered that this is an action alleging fraudulent conspiracy, and, from the allegations of the petition, the range of the testimony was necessarily large.

The allegations of this petition are sufficient to authorize an inspection of all records, documents and correspondence of the Woolson Spice Company from the time Hermann Sielcken became connected with the corporation until his death. This would include evidence of inducement whereby he was encouraged to connect himself with the corporation, if such evidence existed, as well as evidentiary matter since his death that lent light to the alleged fraudulent transactions during his lifetime.

In the absence of any question of privilege, we do not regard the scope of these subpœnas as unreasonably com-[fol. 93] prehensive, or that they constitute unlawful search and seizure.

Clara Sielcken Schwarz as widow and sole residuary legatee of Hermann Sielcken, deceased, upon the refusal of his personal representative to institute the action, had full right and capacity to file and maintain the action brought by her. To hold otherwise would be to place heirs, legatees and devisees at the mercy of capricious administrators, executors and trustees. On this proposition we are content with the authorities cited by the learned Court of Appeals

which heard the case: 24 Corpus Juris, 797, Section 1981; 11 Ruling Case Law, 262, Section 297; 22 L. R. A. (N. S.), 458, note; and 20 Ann. Cas., 96.

Whether the petition is demurrable, or the action is barred by the statute of limitations, or Clara Sielcken Schwarz should not prevail in her suit because of laches, furnish no plausible pretext, and certainly no defense to Bevan, Koehrman and Stranahan for the disobedience of the orders of their subpoenas, in the face of Section 11526, General Code, which provides, in substance, that depositions may be taken at any time after the service of summons.

The right to examine these relators, either orally or by deposition, as upon cross-examination, is statutory, and its exercise does not necessarily constitute a "fishing expedition." Neither of these sections is in contravention of the federal or state Constitutions.

The fact that all parties defendant were not served with summons when their depositions were sought to be taken can make no difference so far as the relators are concerned, if they have been so served.

The contention that the notary who committed the relators was disqualified because of interest is not tenable, and does not come within the purview of Tumey v. Ohio, 273 U. S., 510, 47 S. Ct., 437, 71 L. Ed., 749, 50 A. L. R., 1243.

The review of the action of the notary in committing [fol. 94] relators as provided by Section 11514, General Code, afforded them due process. In addition, the right and opportunity to object to any and all testimony taken by the notary, as being irrelevant, incompetent, or privileged, was preserved to them in the trial court, and they had due process of law.

It has been heretofore held by this court that a notary public, in committing a witness to jail for refusing to answer questions, and in issuing an attachment for a witness who disobeys the order of his subpœna, does not exercise judicial power, and we see no good reason why we should depart from this long-established rule: De Camp v. Archibald, 50 Ohio St., 618, 35 N. E., 1056, 40 Am. St. Rep., 692; Benckenstein v. Schott, Sheriff, 92 Ohio St., 29, 110 N. E., 633.

These cases are likewise sufficient answer to the claim that Sections 11510, 11511 and 11512, General Code, are violative of the state and federal constitutions in denying due process of law.

We find no prejudicial error in the record of any of these cases, and the judgment of the Court of Appeals in each and all of them is affirmed.

Judgments affirmed.

Day, Allen, Jones and Matthias, JJ., concur.

Weygandt, C. J., and Kinkade, J., not participating.

[fol. 95] Reporter's certificate to foregoing paper omitted in printing.

[fol. 96] In Court of Appeals of Lucas County

Docket Entries—Filed in Supreme Court of Ohio July 23, 1932

Court of Appeals Appearance Docket No. 6, Page 191.
C. A. No. 2691

Ex Parte C. N. Bevan

Marshall, Melhorn, Marlar & Martin; Tracy, Chapman & Welles.

1932.

June 14. Petition for Writ of Habeas Corpus filed.

" 14. Writ of Habeas Corpus granted. Bond fixed at $100.00. Jour. 7-276.

June 14. Præcipe filed. Writ of Habeas issued and delivered Sheriff.

" 14. Præcipe filed, Subpœna for 1 witness issued behalf Petitioner.

" 14. Præcipe filed, Subpœna for 1 witness issued behalf Petitioner.

" 14. Præcipe filed, Subpœna for 1 witness issued behalf Petitioner.

June 15. Writ of Habeas Corpus filed endorsed as follows, viz: Received this writ June 14, 1932 at 10:45 a. m. and pursuant to its command I do now

have this 15th day of June, 1932 at 9:30 a. m. the body of C. N. Bevan before the Court of Appeals of Lucas County, Ohio.

I certify that the cause and reason for my having the said C. N. Bevan in custody arises from and is because of a writ and commitment papers issued and delieverd to me by William Purcell, Notary Public, Lucas County, Ohio, which said writ and commitment papers I hereto attach and make a part hereof as completely as though fully rewritten herein.

Joseph Zimmerman, Sheriff, by Rolland Staggemeier, Deputy. .91.

June 15. Amendment to Petition for Writ of Habeas Corpus filed.
" 17. Recognizance filed.
" 22. Petition of Petitioner dismissed. C. N. Bevan remanded to custody of Joseph Zimmerman, Sheriff. Petitioner to pay costs. Exceptions. Jour. 7-285.
June 22. Motion for New Trial filed.
" 22. Above motion overruled. Petitioner excepts and given leave to file Bill of Exceptions. Jour. 7-286.
" 23. Bill of Exceptions of Petitioner filed.
" 23. Time waived; Bill of Exceptions presented to the Court of Appeals.
June 23. Bill of Exceptions returned by Court of Appeals.
June 27. Motion to stay execution of Judgment & order filed.
" 29. Above motion denied. Petitioner excepts. Jour. 7-292.

[fol. 97] Clerk's certificate to foregoing paper omitted in printing.

[fol. 98] Court of Appeals of Lucas County, Ohio

Journal Entries

At a term of the above named court begun and held before the Hon. Harry W. Lloyd, Hon. Silas S. Richards,

Hon. Roy H. Williams, presiding judges, on the 16th day of May, A. D. 1932, among other proceedings had by and before said Court on the 14th day of June, A. D. 1932, being the 25th day of said term, as appears by its Journal of that day, were the following, viz.:

C. A. No. 2691

Ex Parte C. N. Bevan

On the application of C. N. Bevan, upon his filing the petition herein, a writ of habeas corpus is hereby granted as prayed for in said petition, returnable at 9:30 a. m., Wednesday June 15, 1932. Bond is fixed in the sum of $100.00 personal cognizance.

Court of Appeals, by Harry W. Lloyd, Presiding Judge.

In Court of Appeals of Lucas County

C. A. No. 2691

Ex Parte C. N. Bevan

Judgment—June 22, 1932

Now came the Respondent herein, Joseph Zimmerman, Sheriff of the County of Lucas and State of Ohio, and made return of the writ of habeas corpus heretofore issued in this case, and also brought the body of the said C. N. Bevan, petitioner herein.

Whereupon, the court having heard and considered the evidence offered by the petitioner and the respondent, the arguments of counsel and being fully advised in the premises, finds that the said C. N. Bevan is lawfully detained and imprisoned by the said Joseph Zimmerman, Sheriff of Lucas County, Ohio.

It is, therefore, ordered, adjudged and decreed that the petition of the said petitioner, C. N. Bevan, be and the same hereby is dismissed, and he is remanded to the custody of the said Joseph Zimmerman, Sheriff of Lucas County, Ohio; and it is further ordered that the said petitioner pay the costs of this proceeding.

[fol. 99] To all of which orders, judgments and decrees of the court the said petitioner, C. N. Bevan, excepts.

On the 22nd day of June, 1932, being the 32nd day of the May Term, A. D. 1932, an Order in said cause was made, an entry of which appears on the Journal of said Court, in the words and figures as follows, to-wit:

C. A. No. 2691

Ex Parte C. N. Bevan

This cause came on to be heard on the petitioner's motion for a new trial and was submitted to the court. Upon consideration thereof the court finds that said motion is not well taken and the same ought to be and hereby is overruled; to which action and order of the court the petitioner objects and excepts, and upon his application is given leave to prepare and file a bill of exceptions herein.

On the 29th day of June, 1932, being the 38th day of the May Term, A. D. 1932, an Order in said cause was made, an entry of which appears on the Journal of said Court, in the words and figures as follows, to-wit:

C. A. No. 2691

Ex Parte C. N. Bevan

The petitioner's motion for an order suspending and staying execution of the judgment of this court discharging the writ of habeas corpus and remanding him to the custody of the Sheriff of Lucas County and dismissing his petition, having this day come on for hearing, the Court finds that said motion is not well taken and that it should be and the same is hereby denied.

To all of which petitioner excepts.

[fol. 100] No other Judgments or Decrees were rendered or Orders or Journal Entries made in said cause, as appears upon the Journal of said Court.

In testimony whereof I hereunto subscribe my name and affix the Seal of said Court at Toledo, Ohio, this 29th day of June A. D. 1932.

Geo. E. Hardy, Clerk, (Signed) by Gladys Hirschy, Deputy. (Seal.)

THE STATE OF OHIO,
Lucas County, ss:

I, Geo. E. Hardy, Clerk of the Common Pleas and Courts of Appeal within and for the County of Lucas and State of Ohio, do hereby certify that the above foregoing Exhibits numbered 1 to 11 inclusive, contain all the original Pleadings, Process Papers and Records, and copy of opinion, and a full and true Transcript of all the Docket and Journal Entries in said cause and proceeding in said Court and in the Court of Common Pleas of said County, in cause No. 2691 C. A. Ex Parte C. N. Bevan.

In testimony whereof I hereunto subscribe my name and affix the Seal of said Court at Toledo, Ohio, this 29th day of June, A. D. 1932.

Geo. E. Hardy, Clerk, (Signed) by Gladys Hirschy, Deputy. (Seal.)

[fol. 101] IN COURT OF APPEALS OF LUCAS COUNTY, OHIO

C. A. 2691

Ex Parte C. N. BEVAN

PETITION FOR WRIT OF HABEAS CORPUS—Filed June 14, 1932

Your Petitioner, C. N. Bevan, respectfully represents that he is unlawfully imprisoned and restrained of his liberty by Joseph Zimmerman, Sheriff of Lucas County, Ohio, in the County Jail of said County, without any legal authority, but under color of a pretended commitment issued by one William Purcell, styling himself a Notary Public in and for the County of Lucas, State of Ohio, a copy of which alleged commitment is attached hereto.

Your petitioner further says that no questions were or could have been asked him in the pretended taking of his deposition referred to in said commitment, calling for answers or production of any books, papers and records which were relevant or material to any issue in said cause of Sielcken-Schwarz vs. The Woolson Spice Company, et al., #131925 in the Common Pleas Court of Lucas County; that in fact, as your petitioner is advised, the petition in the cause in which it was attempted to take said deposition is demurrable because it does not state facts sufficient to constitute a cause of action, because the plain-

tiff has not legal capacity to sue and for other reasons, and, as hereinafter set forth, a demurrer on said grounds and other grounds is now in fact pending in the Court of Common Pleas of Lucas County, Ohio; that the subpœna which was served on your petitioner purporting to require him to appear before a notary public and to produce books, papers and records (a copy of which subpœna is hereto attached) was illegal and void and called for the production of books, papers and records, without any adequate or definite description thereof or any designation of which thereof plaintiff claims to be relevant or material in said action; that petitioner is informed and believes and therefore avers that proper notice of the taking of said pretended deposition, such as to make it admissible in evidence on the trial of this cause, has not been made in that service of such notice [fol. 102] has not been made upon all of the defendants in said cause, and in that summons has not been served upon all of the defendants in said cause and cannot be served upon The Irving Trust Company, as Executor, one of said defendants; that petitioner is a resident of Lucas County, Ohio, in good health, and in every way capable of and expecting to appear at the trial of this cause in the Court of Common Pleas of Lucas County, Ohio, if called as a witness.

Petitioner further avers that the subpœna duces tecum served upon him, as aforesaid, constitutes an attempted unreasonable search and seizure such as is forbidden by the Constitution of the State of Ohio, including Section 14 of Article I thereof, among others, and by the Fourteenth Amendment to the Constitution of the United States, and that William Purcell, the Notary Public, before whom said depositions were, according to said pretended notice, to be taken, has attempted to exercise judicial power in violation of Section 1 of Article IV of the Constitution of Ohio by issuing the warrant for the arrest of your petitioner under which petitioner is, as aforesaid, now unlawfully restrained of his liberty by the Sheriff of this County. Petitioner says that he has been deprived of his liberty without due process or course of law and in violation of Section 1 of Article IV, Section 14 of Article I and Section 16 of Article I of the Constitution of the State of Ohio and in violation of the Fourteenth Amendment to the Constitution of the United States.

Petitioner further says that one of the defendants in said cause did on the 11th day of June, 1932, file a demurrer to the petition therein upon the grounds, among others, that plaintiff has not legal capacity to sue, and that the petition does not state facts showing a cause of action, and did on the said date file a brief in support of said demurrer, which said demurrer is pending in said Court of Common Pleas of Lucas County, Ohio, and certain of the defendants in said cause did, on or about the 4th day of June, 1932, file in said cause a motion to quash notice to take depositions and subpœnas duces tecum, and for an injunction, enjoining and restraining plaintiff and her attorneys from taking depositions in said cause until such time, if any, as might be fixed by said Court of Common Pleas for so doing, which said motion and a supplement thereto praying for an injunction against the further taking of the afore-[fol. 103] said deposition, are now pending before said Court of Common Pleas. Said demurrer, motion and supplement to said motion have not been decided and no orders have been issued upon them.

Petitioner is advised and says that said demurrer, motion and supplement to said motion, are well taken and should be sustained and granted.

Petitioner further says upon information and belief that plaintiff was not in good faith in attempting to take his testimony, as aforesaid, and that it was not the intention of plaintiff or her expectation that said testimony should be transcribed or used in the trial of said cause, except for the purpose of endeavoring to learn and ascertain facts and information to which plaintiff is not lawfully entitled, and for the purpose of endeavoring to learn and ascertain the means by which certain of the defendants in said cause expected and intended to establish their defenses to the alleged claims asserted by plaintiff in her petition against said defendants.

Wherefore petitioner prays that a writ of habeas corpus be issued to the said Joseph Zimmerman, Sheriff of Lucas County, Ohio, and that petitioner be discharged from said imprisonment and restraint of his liberty.

Marshall, Melhorn, Marlar & Martin, Tracy, Chapman & Welles, Attorneys for Petitioner.

Duly sworn to by C. N. Bevan. Jurat omitted in printing.

[fol. 104] IN COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 131,925

CLARA SIELCKEN-SCHWARZ, Plaintiff,

vs.

THE WOOLSON SPICE COMPANY et al., Defendants

SUBPŒNA DUCES TECUM

C. N. Bevan, Secretary-Treasurer the Woolson Spice Company, Summit Street, Toledo, Ohio:

You are hereby commanded to appear before the undersigned, a Notary Public within and for the County of Lucas, State of Ohio, at the office of Fraser, Hiett, Wall & Effler, Seventh Floor of the Home Bank Building, Toledo, Ohio, at nine thirty o'clock A. M., on Monday, June 13, 1932, and then and there give evidence as a witness on behalf of the plaintiff in the above entitled action; and you will, and at that time and place, produce and have with you the following papers and records:

1. The books, papers and records of The Woolson Spice Company of Toledo, Ohio, by whatever name called, containing records and entries showing the following.

(a) The ownership and all transfers of the corporate stock of said company from the year 1908 to 1932, inclusive, and any and all options and/or contracts for the purchase or sale of any of said corporate stock, during the same period of time.

(b) All records showing the declaration and payment, and to whom paid, of any and all cash and/or stock dividends declared and paid by The Woolson Spice Company from the year 1916 to 1932 inclusive.

(c) A complete list of stockholders, officers and directors of said company for each year during the period from 1909 to 1932 inclusive.

[fol. 105] (d) All records and minutes of all meetings of the stockholders of The Woolson Spice Company from 1908 to 1932 inclusive.

(e) The annual accountings and financial statements of The Woolson Spice Company from the year 1908 to 1932 inclusive.

(f) The stock inventories, records of purchase and sales, operating costs and expenses, profits and/or losses of The Woolson Spice Company during the years 1916 to 1932 inclusive.

(g) Detailed records of purchases and sales and contracts therefor of The Woolson Spice Company during the years 1917 and 1918.

and you will also produce and have with you at said time and place all correspondence on file in the office of The Woolson Spice Company with any and all of the following individuals and corporations and partnerships, from the years 1916 to 1932 inclusive:

John W. Koehrman, Toledo, Ohio.
William A. Brigham, Toledo, Ohio.
Franklin H. Biggs, Toledo, Ohio.
Marion M. Miller, Toledo, Ohio.
Frank D. Stranahan, Toledo, Ohio.
Robert A. Stranahan, Toledo, Ohio.
The Columbia Trust Company, New York.
The present and former officers, directors, stockholders, agents and employees of The Columbia Trust Company, New York.
George E. Warren, New York.
Willard V. King, New York.
The Alien Property Custodian, Washington, D. C.
The present and former directors, agents, representatives and attorneys of The Alien Property Custodian, Washington, D. C. and New York.
Thorlief Nielsen, New York.
John S. Sorenson, New York.
Sorenson and Nielsen, New York.
Arthur Young and Company, New York.
The present and former partners, agents and employees of Arthur Young and Company, New York.
Arthur Young, New York.
D. D. McKenzie, New York.
A. Vander Sommen, New York.
S. P. Jermain, Toledo, Ohio.

2. You will also have and produce at said time and place, the entire correspondence file of The Woolson Spice Company and any of its officers and agents with Herman Sielcken, New York, N. Y., and with Crossman and Sielcken, New York, N. Y., from the years 1895 to 1918 inclusive.

3. You will also produce and have with you at said time [fol. 106] and place, all correspondence of The Woolson Spice Company with any and all of its officers, directors, stockholders, agents, employees and customers during the years 1917 and 1918.

Hereof fail not under penalty of the law.

Given under my hand and seal at Toledo, Ohio, this 7th day of June, 1932.

(Signed) William Purcell, Notary Public, Lucas County, Ohio. (Seal.)

(Rubber stamp:) William Purcell.

[fol. 107] In Court of Common Pleas of Lucas County, Ohio

No. 131,925

State of Ohio,
County of Lucas, ss:

Notary's Order of Commitment

To Joseph Zimmerman, sheriff, Lucas County, Ohio:

Whereas, on the 13th day of June, 1932, in a certain action then and since June 2, 1932, and still pending in the Court of Common Pleas of Lucas County, Ohio, wherein Clara Sielcken Schwarz is plaintiff, and The Woolson Spice Company et al., are defendants, Number 131,925 on the docket of said Common Pleas Court of Lucas County, Ohio, the undersigned, William J. Purcell, a Notary Public in and for said County and State, at the office of Fraser, Hiett, Wall and Effler, in said County and State, and at the request of said plaintiff in said cause, and pursuant to a notice duly served upon The Woolson Spice Company, John W. Koehrman, Franklin H. Biggs, Frank D. Stranahan, and Robert A. Stranahan, defendants in said cause, was

taking the deposition of witnesses in said action, and C. N. Bevan, a resident of said County of Lucas and State of Ohio, then and there appeared as a witness on behalf of said plaintiff in response to a subpœna, and was sworn and examined, and upon his examination as a witness, and while his deposition was then and there being taken, and for the purpose of making the answers thereto a part of said deposition, and for the purpose of causing the production of books, records and papers referred to in said examination, and in a subpœna duces tecum served upon said witness, the following proceedings were had, including, the questions propounded to the witness, the answers thereto wherever answers were made, the objections and remarks of counsel, the orders of the undersigned, directed to the witness, and the refusals of the witness to answer, and refusals of the witness to produce said records and documents, wherever said refusals occur:

[fol. 108] Transcript of Proceedings Before Notary

June 13, 1932—9:30 o'clock A. M.

Mr. Welles: On behalf of the Defendants, the Woolson Spice Company, J. W. Koehrman, Robert A. Stranahan, Frank D. Stranahan and Franklin H. Biggs, Messrs. Stuart S. Wall, Harry S. Bugbee and George D. Welles appear for the purpose only of protesting against this illegal attempt to take depositions and state that in our opinion, and until the Court shall otherwise rule, we shall take the position that the Plaintiff has no right to take the depositions of the witnesses who have been subpœnaed, or any other witnesses, for the reasons, among others, that the petition is demurrable and raises no issue of fact upon which testimony can be taken and a demurrer in fact has been filed and is now pending on the ground, among others, that the petition does not state facts sufficient to constitute a cause of action. We further rely upon the other points made in the demurrer, among others, that the Plaintiff has no legal capacity to sue, and, hence, has no right to take the depositions.

We further rely upon, and direct attention to the fact, that summons has not been served upon one of the Defendants in this cause; that notice to take these depositions has not been served upon the same Defendant, namely, Marion

M. Miller, and so far as we are advised, there has been no legal service of notice upon the Irving Trust Company, Executor, and there has been no legal service of summons upon the Irving Trust Company, Executor, and that company is not and cannot, we believe, legally be made a party defendant as Executor in this cause.

We further rely upon and protest against the taking of the depositions on the ground that the time allowed for any attempt to comply with the subpœnas for Bevan and Koehrman has been entirely too short and it has been impossible to make a complete examination and check of the files. Further, that the subpœnas for the witnesses Bevan and Koehrman are far too broad and indefinite and they constitute an attempt at unreasonable search and seizure [fol. 109] and violation of due process of law, an infringement of the constitutional rights of the witnesses and of the Defendants under the Constitution of Ohio and under the Fourteenth Amendment to the Constitution of the United States. Lastly, that this attempt to take depositions is not one such as is permitted by law but is a mere fishing expedition started in the hope that possibly something may be found which will enable the Plaintiff to state a cause of action.

For the above reasons, among others, not waiving any rights whatsoever, we object and protest to the taking of any testimony at this time. In addition to this special appearance for the Defendants, we appear as counsel for the witness, C. N. Bevan.

Mr. Jackson: Let the record show that a week ago today depositions were noticed for taking in this case; that before that time, the defendants served notice of a motion to be heard on that morning seeking to quash the service of the notice and the service of the subpœnas then made, and asking for an injunction against the taking of depositions by the Plaintiff in this case on that notice and on the subpœnas then issued; that during the course of a hearing upon the motion had on that day, and at the suggestion of the Judge before whom the motion was heard, it was agreed among counsel now representing and then representing the Defendants and counsel for the Plaintiff, with the approval of the Court before whom the motion was noticed, the hearing on such motion should be continued indefinitely, that the depositions should go forward at this time and at this

place; that new notices and subpœnas would be issued to correct any possible technical objections to the manner of the issuance of the notice and the subpœnas; that the witnesses so subpœnaed would appear and answer questions; that counsel would make no objection on the ground that a demurrer was pending, if such should be the fact, although of course the Plaintiff wishes to state that such an objec-
[fol. 110] tion is without merit and unknown to the law; that witnesses were to be produced and the only limitation was that counsel would reserve the right to object to any questions propounded for any reason which is recognized in the law; that the witnesses, Koehrman and Bevan, if subpœnaed would appear with such of the books and records as they had been able to collect and that if they had not been able to collect all the records which were subpœnaed, they would nevertheless appear and we would go forward as we conveniently could; that the action which has just been taken by counsel for the Defendants is in direct violation of the conditions upon which a continuance was had a week ago today.

Mr. Welles: We regret to have any misunderstanding with counsel for Plaintiff but Mr. Jackson's recollection is entirely at error as to what took place last Monday. The hearing was continued indefinitely but with the distinct statement to Judge Gosline that either party should have the right to request the Court to resume the hearing at any time. It was not stated that the depositions should go forward and the witnesses would appear and answer questions, and that counsel would make no objection on the ground that there was a demurrer pending, and it is not correct that the only reservation was that counsel for the Defendants would raise objections to such specific questions as they might deem improper for reasons known to the law; nor was it stated that the witnesses would appear with such books and records as they had been able to find or with any books and records; nor was it stated that we would go forward with the depositions so far as we could with such books and records as the witnesses could find. On the contrary, the statement of counsel for Defendant was merely that if the hearing was put over until today that the two witnesses who had been subpœnaed would appear and

would answer some questions, what questions they would answer or how many they would answer counsel for Defendant said would be determined by counsel for Defendant on this occasion, and it was distinctly stated that if counsel [fol. 111] for Plaintiff thought that the Defendants were going to bring in their files in answer to such a blanket subpœna for counsel for Plaintiff to paw through and see what they could find, that they were very seriously mistaken; that nothing of that sort would be done until ordered by a Court. In exact compliance with what was then said, we have here Mr. Bevan, one of the two witnesses who were subpœnaed, with whom proceedings may go forward and at the conclusion of such questions as he may answer, if you desire to have Mr. Koehrman appear under the same statement, Mr. Koehrman will appear.

Mr. Fraser: Just a word. I was present when the agreement was made for the setting of these depositions at nine-thirty o'clock this morning. I very distinctly remember that we were discussing ten o'clock in the morning. Mr. Welles suggested it might be better to place it at nine-thirty and at his request nine-thirty was fixed and I remember very distinctly that I asked Mr. Welles whether at that time he would interpose a general objection upon the ground that he had on file, if he did file it—he did say he was going to file a demurrer—I said "Do you intend Monday morning next to interpose a general objection to the taking of this testimony on the ground that the demurrer is pending?" Mr. Welles very clearly and very distinctly said "I will not. The witnesses will answer questions. There will be no general objection upon that ground. If the questions are incompetent, we will object." In compliance of his suggestion of fixing the time at nine-thirty, all of it following as a stipulation, resulting in what Judge Gosline suggested, new notices were served and new subpœnas served. We insist we have the right to proceed and that these witnesses must attend.

Mr. Welles: It is my recollection Mr. Fraser is also in error in certain respects, even as to the time; that the time was suggested as nine o'clock but at my request it was changed to nine-thirty instead of nine and that the conversation with respect to the general objection was whether or [fol. 112] not we would instruct the witnesses not to testify at all on the ground that there was a demurrer pending and

I said that we would not, that the witnesses would answer some questions.

Mr. Bugbee: We didn't say how many.

Mr. Jackson: We do not desire, as counsel for the Plaintiff, to debate this matter further. It is obvious that we have been misled and whether or not any weasel words which could be interpreted differently than we understood them in reference to this misunderstanding in taking depositions, it is profitless to debate further and we may as well go forward.

Mr. Welles: I resent that statement and I want to make this clear that I said to Mr. Jackson and I said to Mr. Fraser last Monday morning, so that there might be no misunderstanding at all, that I wanted them to know that we intended to reserve and to raise every objection and ground of objection which we had or conceived that we had and would do so this morning.

Mr. Jackson: I want the record to show that of course if any such statement had been made, we would have gone forward and determined the matter before the Court had ended that morning. We would not agree to postponing for one week the solution of the problems which were raised if there were no advantage to be gained. We call Robert A. Stranahan who is under subpœna to appear here this morning. Can counsel for Mr. Stranahan state whether he is here?

Mr. Welles: I don't see him.

Mr. Jackson: Does he expect to be here shortly?

Mr. Welles: I haven't seen him. I don't know.

Mr. Jackson: We now call Mr. Frank Stranahan who is under subpœna to appear here as a witness this morning. Can counsel for Mr. Frank Stranahan state whether he is here or will be here shortly?

Mr. Welles: I don't see him here and I haven't seen him and I don't know.

[fol. 113] Mr. Jackson: Have counsel for Defendants given any instruction to Robert A. Stranahan or Frank Stranahan with reference to appearing here this morning?

Mr. Welles: I would say this, that the only two witnesses who had been subpœnaed last Monday were Mr. Koehrman and Mr. Bevan, and they were the two witnesses which we had in mind when we said witnesses would appear here.

Now you go ahead and don't ask me questions. You go ahead and say whatever you want to.

Mr. Jackson: I am saying whatever I want to, Mr. Welles. Can counsel for the Defendants answer the question as to whether Mr. Robert A. Stranahan or Mr. Frank Stranahan have been instructed to appear or not to appear here this morning?

Mr. Welles: I am not going to answer any more of your questions.

Mr. Jackson: We now call for Mr. John Koehrman who is under subpœna to appear here for his deposition this morning.

Mr. Welles: As I have stated, Mr. Koehrman will be here after you get through with Mr. Bevan.

Mr. Jackson: Has counsel for the defendant instructed Mr. Koehrman not to appear this morning at nine-thirty in response to his subpœna? We now ask to have the taking of these depositions adjourned until two o'clock this afternoon and an order for this witness to be here at that time, and an order issued to Mr. Bevan to be here with the records covered by his subpœna so far as he has been able to locate them by that time.

The Notary: Mr. Bevan, in compliance with your subpœna, you are ordered to be here this afternoon at two o'clock with the records which you are able to find.

Mr. Jackson: The taking of the depositions of the witnesses subpœnaed for this morning is continued then until two o'clock this afternoon at this same place described in the notice, is that right, Mr. Notary?

The Notary: Yes.

[fol. 114] Mr. Welles: We will notify you gentlemen of the Court's convenience between now and twelve o'clock, if possible. We will renew our application for an injunction.

June 13th, 1932—2:00 o'clock p. m.

Hearing resumed.

Mr. Welles: We now renew our protest and objection against the taking of any depositions on the grounds stated this morning and on the additional ground that we have filed a supplement to our motion for injunction and re-

quested that a hearing at as early a date as possible be had and it has been set for hearing before the Court of Common Pleas, the Honorable Robert Gosline, Judge, at nine o'clock tomorrow morning, and notice has been served upon counsel for the Plaintiff to that effect.

Mr. Jackson: We now call Robert A. Stranahan as a witness, he having been subpœnaed to appear for his deposition before the Notary this morning at nine-thirty and at any adjournment thereof.

Mr. Welles: Mr. Stranahan was out of town this morning and is not feeling well this afternoon. Without waiving any of his rights or in any way subjecting himself to the jurisdiction of the Notary, he will, if desired, be willing to meet with you gentlemen here at nine o'clock tomorrow morning. I should say perhaps not nine o'clock, but immediately following the hearing in the Court of Common Pleas tomorrow morning.

Mr. Fraser: Where is he this afternoon?

Mr. Welles (continued): Depending upon the result of that hearing.

Mr. Fraser: Where is he this afternoon?

Mr. Welles: I don't know.

Mr. Jackson: We now call as a witness Frank D. Stranahan who is under subpœna to appear and give his deposition before the Notary, first this morning at this place at nine-thirty and at any adjournment of such depositions.

[fol. 115] Mr. Welles: I am advised that Mr. Frank D. Stranahan is not present in Lucas County but he is absent preparing for the trial of a law suit which will be for hearing in Bowling Green tomorrow where he will be tomorrow in attendance upon the Court of Common Pleas there.

Mr. Jackson: We call as a witness John W. Koehrman who was under subpœna to appear before the Notary to give his deposition at this place at nine-thirty this morning and at any adjournment of the taking of such depositions.

Mr. Welles: Without waiving any rights or submitting himself to the jurisdiction of the Notary, Mr. Koehrman will come over here and meet with you gentlemen this afternoon, whenever you are through with Mr. Bevan who is now here.

Mr. Jackson: Where is Mr. Koehrman?

Mr. Welles: He is around some place.

Mr. Jackson: Is Mr. Koehrman staying away on advice of his counsel?

Mr. Welles: I am not on the stand, Mr. Jackson.

Mr. Jackson: We call C. N. Bevan.

Mr. Welles: We object to Mr. Bevan being sworn for the reasons previously stated but if he wishes he may submit to being sworn.

C. N. Bevan, being first duly sworn according to law, testified as follows:

Examination by Mr. Jackson:

Q. Mr. Bevan, are you the Secretary-Treasurer of The Woolson Spice Company, the Defendant?

Mr. Welles: We object to this and each and every question which may be asked Mr. Bevan upon the grounds previously stated for objecting to this deposition, saying that on behalf of the defendants. As representing Mr. Bevan, I see no objection to his answering that question.

A. At the present time, you mean?

[fol. 116] Q. Yes.

A. Yes sir.

Mr. Jackson: Let the record show we call Mr. Bevan for cross-examination under the statute.

Q. Give your full name and residence, Mr. Bevan.

A. Charles N. Bevan, 211 West Delaware, Toledo, Ohio.

Q. And that is in Lucas County, in this State?

A. Yes sir.

Q. How long have you been connected with The Woolson Spice Company in any capacity?

A. Thirty-eight years.

Q. And what would that be, if you have arithmetically figured out as the date when you became such?

A. 1894.

Q. How long have you been Secretary-Treasurer?

A. Since October 1st, 1918.

Q. Is that the first office which you held with The Woolson Spice Company?

A. No sir.

Q. What offices if any did you hold before?

A. Treasurer.

Q. How long did you hold that before 1918?
A. January of 1918. I was elected January, 1918.
Q. You were elected Treasurer at that time?
A. Treasurer, yes sir.
Q. Was that the first office that you ever held?
A. Yes sir.
Q. In what capacity had you been employed generally from 1894 down to the time that you were elected Treasurer of The Woolson Spice Company?
A. Bill clerk, bookkeeper, credit man, Treasurer, Secretary-Treasurer.
Q. Are you a stockholder of The Woolson Spice Company?

Mr. Welles: We object. You needn't answer that unless [fol. 117] you want to, on the ground that it is not material to any issue and there is no issue raised by the petition.

A. You mean at the present time?

Mr. Welles: You needn't answer that, Mr. Bevan.

Q. Yes, at the present time.

Mr. Welles: I think perhaps we will save time if I should state what we regard as any questions the witness will submit to, that is, if you have some papers, records or documents in your possession which you desire him to identify and he can, we do not object to his doing so.

Mr. Jackson: We appreciate the graciousness of counsel but we will ask the questions as we see fit and then if counsel cares to object, it will be noted and I presume a ruling will be made in due course.

Q. Do you refuse to answer the question, Mr. Bevan?
A. On advice of counsel.
Q. Do you have any other reason for not wanting to answer the question?
A. No sir.
Q. Do you claim it might incriminate you?
A. No sir.

Mr. Jackson: We ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "Are you a stockholder of The Woolson Spice Company?" and I, as Notary, now order you to answer the question.

A. I am.

Q. How long have you been a stockholder, Mr. Bevan?

Mr. Welles: We object, and I think I should explain to Mr. Bevan that the question of whether or not you shall answer these questions will be determined by the Court and not by the Notary. The Notary may order you to answer and the Court will then determine whether his order is valid or not.

[fol. 118] Q. Mr. Bevan, will you produce the subpœna served on you, the one that was served on Tuesday last?

A. I haven't that with me, not Tuesday.

Q. Well, the last one?

A. Oh, the last one?

Q. Yes.

A. Yes sir.

Mr. Jackson: The witness has produced a subpœna which was served upon him; the subpœna bears date of June the 7th and we ask to have this marked as "Bevan Exhibit 1."

Q. Mr. Bevan, I direct your attention to the word "none" written opposite the sub-paragraph (a) of paragraph 1 of Bevan Exhibit 1 and ask you who wrote that?

A. I can't tell you. It is not my writing.

Q. It isn't your handwriting?

A. No sir.

Q. Do you know Mr. Koehrman's handwriting?

A. I do.

Q. Is it Mr. Koehrman's handwriting?

A. It don't look like it.

Q. Do you know Mr. Welles' handwriting?

A. No sir, I never saw it.

Q. Do you know Mr. Marshall, E. J. Marshall's handwriting?

A. I have seen that.

Q. Is that his handwriting?

A. No sir, I don't think so, no sir.

Q. Are you sure about it?

A. Yes sir.

Q. Now, I direct your attention to the word "no" written in lead pencil opposite sub-paragraph (f) of paragraph 1 on Bevan Exhibit 1 and ask you whether that is in your handwriting?

A. Yes sir.

Q. When did you write that there?

A. I don't recall the exact time or when, just what day I [fol. 119] wrote it. That is mine right there, yes sir.

Q. Why did you write it?

Mr. Welles: We object. You needn't answer.

Q. What is your answer?

Mr. Welles: The witness declines to answer on the advice of counsel.

Mr. Fraser: Let him say it.

Mr. Welles: I am saying it.

Mr. Fraser: No, don't you testify, George.

A. I refuse to answer that question on the advice of counsel.

Q. Have you any other reason for not wanting to answer?

A. No sir.

Q. Do you claim it might incriminate you?

A. No sir.

Q. Mr. Bevan, have you with you the records and minutes of the meetings of the stockholders and of the directors of The Woolson Spice Company for 1917 and 1918?

A. No sir.

Q. Did you make a search for them?

A. Yes sir.

Q. Are they in your custody?

A. They are.

Q. And you read the subpœna, that part of it which directed you to produce all records and minutes of all meetings of the stockholders and meetings of the directors and executive committees of The Woolson Spice Company from 1908 to 1932 inclusive, did you?

A. Yes sir.

Q. And did you understand what books or records that called for?

A. Yes sir.

Q. Why have you not them here?

A. They are not here on advice of counsel.

Q. That is, you deliberately refuse to produce any of the records or minutes of the stockholders for any of the [fol. 120] years from 1908 to 1932, referring to the records of The Woolson Spice Company, is that right?

A. That is right.

Q. And do you now refuse to produce them?

A. On advice of counsel I do.

Q. What counsel advised you not to produce them?

A. The Woolson Spice Company's counsel, acting in my behalf.

Q. Acting in your behalf?

A. Yes, my counsel.

Q. Well, who are they?

A. Mr. Welles.

Q. That is, Mr. Welles who is here as attorney for the Defendants advised you not to produce these records, is that right?

A. That is right.

Mr. Welles: That is right.

Q. Now Mr. Bevan, have you the records of the minutes of the meetings of the directors of The Woolson Spice Company for any of the years 1908 to 1932 inclusive?

A. I have.

Q. They are in your custody, is that right?

A. They are in my custody, yes sir.

Q. And are they kept in the offices of the company at the plant here in Toledo?

A. Yes sir.

Q. That is true of the records of the minutes of the stockholders' meetings?

A. Yes sir.

Q. They are all now there, are they?

A. No sir, they are not there now.

Q. Where are they?

A. In the hands of our counsel.

Q. That is, the records of the meetings of the stockholders of The Woolson Spice Company from 1908 to 1932 are in the hands of some one of your counsel now?

[fol. 121] A. Yes sir.

Q. Which of your counsel has them?

A. I don't know that. I can't answer that question.

Q. To whom did you deliver them?

A. Delivered them to Mr. Wall.

Q. To Mr. Wall, who appears here representing the firm of Marshall, Melhorn, Marlar & Martin?

A. Yes sir.

Q. When did you do that?

A. Why, preceding the first subpœna.

Q. Preceding?

A. Immediately following the first subpœna that I received. It was last Thursday a week ago.

Q. Now, what about the records of the meetings of the directors of The Woolson Spice Company; where are they now?

A. They are in the same book.

Q. In the same book?

A. Yes sir.

Q. And the same book that was delivered to Mr. Wall?

A. Yes sir.

Q. And that delivery was made last Thursday?

A. Yes sir.

Q. Well, you had been served with a subpœna in this case before last Thursday, hadn't you?

Mr. Welles: We object. You needn't answer that.

Mr. Jackson: This is cross-examination.

A. No sir, not in this case before last Thursday. A week ago last Thursday, June 2nd.

Q. Oh, I see. I thought you were speaking of Thursday of the week past.

A. No sir.

Q. Now, where are the minutes of the meetings of the executive committee of The Woolson Spice Company?

A. I have never seen any records of any meetings of the [fol. 122] executive committee of The Woolson Spice Company.

Q. Does the Woolson Spice Company have an executive committee?

Mr. Welles: We object. I think we have no- gone far enough for you to raise any questions you want to raise and if you want to ask any questions which you regard as important to raise the question of your rights here, I suggest you do so. I advise Mr. Bevan that it is unnecessary for him to answer any further questions.

Mr. Jackson: I ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "Does The Woolson Spice Company have an executive committee?" and I, as Notary, now order you to answer the question.

Mr. Welles: The Court will determine whether that is a valid order or not, Mr. Bevan. I advise you to await the Court's ruling on it.

Q. Mr. Witness, you heard the Notary order you to answer the question. What do you answer?

Mr. Welles: The witness declines to answer.

Mr. Fraser: Oh no, he hasn't declined. Let him say something.

A. Well, I will decline to answer that on the advice of counsel.

Q. Mr. Bevan, I direct your attention to sub-paragraph (e) of paragraph 1 of Bevan Exhibit 1 reading "The annual accountings and financial statements of The Woolson Spice Company from the year 1908 to 1932 inclusive." Have you those annual accountings or financial statements for those years or any of them with you?

A. Will you give me the years again, please?

Q. 1908 to 1932 inclusive.

A. With me?

Q. Yes.

A. No sir.

Q. Are there annual accountings or financial statements [fol. 123] of The Woolson Spice Company for any of the years from 1908 to 1932 inclusive in the records of the company?

A. Yes sir.

Q. Are there such annual accountings or financial statements for each of those years.

A. I am not sure about how far from 1908 on it goes.

Q. Do they commence in 1908?

A. I would have to refer to the record on that. I couldn't answer that question.

Q. Well, you know that there are such annual accountings and financial statements for some of those years?

A. Yes sir.

Q. Now, can you recall for which ones of those years to your knowledge there are such accountings or statements?

Mr. Welles: We object. You needn't answer that question.

Mr. Jackson: We ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "Now, can you recall for which ones of those years to your knowledge there are such accountings or statements" and I, as Notary, now order you to answer the question.

A. I refuse to answer upon the advice of counsel.

Q. Mr. Bevan, you read this sub-paragraph (e) of paragraph 1 of Bevan Exhibit 1 when it was served upon you, didn't you, the one I just read to you?

A. Yes sir.

Q. And you understood what was meant by annual accountings or financial statements?

A. Yes sir.

Q. Did you examine the records of The Woolson Spice Company in your custody to determine what if any such annual accountings or financial statements there were?

Mr. Welles: We object. You needn't answer.

Mr. Jackson: I ask the Notary to order the witness to [fol. 124] answer the question.

The Notary: The question is, Mr. Bevan, "Did you examine the records of The Woolson Spice Company in your custody to determine what if any such annual accountings or financial statements there were?" and I, as Notary, now order you to answer the question.

A. I refuse to answer on the advise of counsel.

Q. Such annual accountings and financial statements of The Woolson Spice Company from the year 1908 to 1932 as are in existence are in your custody now, are they?

A. Yes sir.

Q. And where are you keeping them, in the offices of The Woolson Spice Company?

A. Yes sir.

Q. Have they been removed from there at any time since the service of this subpœna?

A. No sir.

Q. And have you examined the file at any time since the service of this subpœna?

Mr. Welles: You needn't answer that one. Object.

Mr. Jackson: I ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "And have you examined the file at any time since the service of this sub-

pœna?" and I, as Notary, now order you to answer the question.

A. I refuse to answer on the advice of counsel.

Q. Mr. Bevan, I direct your attention to sub-paragraph (a) of paragraph 1 of Bevan Exhibit 1 reading "The ownership and all transfers of the corporate stock of said company from the year 1908 to 1932 inclusive; and any and all options and/or contracts for the purchase or sale of any of said corporate stock, during the same period of time". Did you read that when the subpœna was served upon you?

A. I did.

Q. And has The Woolson Spice Company any records of [fol. 125] the ownership of its stock for any of the years from 1908 to 1932 inclusive?

A. Yes sir.

Q. And are such records of the stock ownership of The Woolson Spice Company in your custody as Secretary?

A. Yes, sir.

Q. And where are you keeping them?

A. In the offices of the company.

Q. Have you produced any of those records here today?

A. No sir.

Q. Did you understand that this subpœna purported to direct you to produce such stock records here today?

A. Yes sir.

Q. Why did you not produce them?

A. I did not produce them on the advice of counsel, of our counsel.

Q. When you say "on the advice of our counsel" you mean Mr. Welles?

A. Yes sir.

Q. Did you counsel with any one else about it?

A. No, sir.

Q. Will you now produce the stock records of the company for the years from 1908 to 1932?

Mr. Welles: I advise the witness that it would be improper for him to do so as they are corporate records which should not be exposed to the gaze of strangers to the corporation, persons who have no right to see them, and that there is no valid order outstanding for their production here until the Court holds otherwise.

Mr. Jackson: I ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "Will you now produce the stock records of The Woolson Spice Company for the years from 1908 to 1932?" and I, as Notary, now order you to answer the question.

A. I refuse to answer it on the advice of counsel.

Q. Will you produce the stock transfer records of The [fol. 126] Woolson Spice Company for the year 1918?

Mr. Welles: I give the witness the same advice; until the Court so orders, it will not be necessary or proper for him to produce them here.

Mr. Jackson: I ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "Will you produce the stock transfer records of The Woolson Spice Company for the year 1918?" and I, as Notary, now order you to answer the question.

A. I refuse to answer on the advice of counsel.

Q. That is, you refuse to say whether you will or will not produce them?

A. Yes sir, whether I will or will not.

Mr. Jackson: That is a commendable caution on the part of counsel, I should think.

Q. Mr. Bevan, are there in the files and records of The Woolson Spice Company any original or copies of any options or contracts for the purchase or sale of any of the corporate stock of The Woolson Spice Company during the year 1918?

Mr. Welles: I advise the witness that that is a question that is neither necessary or proper for him to answer and object to it.

Mr. Jackson: I ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "Mr. Bevan, are there in the files and records of The Woolson Spice Company any original or copies of any options or contracts for the purchase or sale of any of the corporate stock of The Woolson Spice Company during the year 1918?" and I, as Notary, now order you to answer the question.

A. I refuse to answer that on the advice of counsel.

Q. I similarly ask you whether there are in the files and records of The Woolson Spice Company any originals or [fol. 127] copies of contracts for the purchase or sale of the corporate stock, or any of it, of The Woolson Spice Company during the years 1919, 1920 and 1921?

Mr. Welles: I similarly give the witness the same advice.

Mr. Jackson: I ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "I similarly ask you whether there are in the files and records of The Woolson Spice Company any originals or copies of contracts for the purchase or sale of the corporate stock, or any of it, of The Woolson Spice Company during the years 1919, 1920 and 1921?" and I, as Notary, now order you to answer the question.

A. I refuse to answer on the advice of counsel.

Q. Mr. Bevan, directing your attention to sub-paragraph (a) of paragraph 1 of Bevan Exhibit 1, state if you know whether the notation of the word "none" in pencil opposite that part of sub-paragraph (a) of paragraph 1 of said exhibit relating to options and/or contracts for the purchase or sale of any of said corporate stock during the same period of time, referring to the Woolson corporate stock and the period from 1908 to 1932 is intended to indicate that there are no such options or contracts or copies thereof in the files of the company.

Mr. Welles: I advise the witness, until the Court otherwise rules, he needn't answer that question and object to it.

Q. What is your answer?

A. I refuse to answer on the advice of counsel.

Q. Now Mr. Bevan, I direct your attention to sub-paragraph (b) of paragraph 1 of Bevan Exhibit 1 and ask you whether you have with you any of the records therein described, being records relating to the declaration and payment of cash or stock dividends by The Woolson Spice Company from 1916 to 1932?

A. I have not.

Q. Are there records of declarations of such dividends and payments in the files?

[fol. 128] Mr. Welles: Mr. Bevan, we now advise you that in our opinion until the Court has had an opportunity to

rule upon this proceeding that it is unnecessary for you to answer any more questions at all upon any subject and we suggest that you decline to answer any further questions until such time as the Court of Common Pleas, or other Court, has determined whether or not this proceeding is proper and whether these questions are proper.

Mr. Jackson: I ask the Notary to order the witness to answer the question.

The Notary: The question is, Mr. Bevan, "Are there records of declarations of such dividends and payments in the files?" and I, as Notary, now order you to answer the question.

A. I decline to answer.

Q. Do you refuse to produce any such record of declaration and payments by The Woolson Spice Company?

A. I do.

Q. Now Mr. Bevan, I show you Bevan Exhibit 1 and ask you whether you refuse to produce any of the papers described in that subpœna?

A. I refuse to answer on the advice of counsel.

Q. When did your counsel advise you on that question, Mr. Bevan?

A. He just did advise me to refuse.

Q. Have you produced any of the papers or records described in this subpœna marked Bevan Exhibit 1?

A. Here at this meeting you mean?

Q. That is right.

A. No sir.

Q. You read this subpœna, Exhibit 1, and understood that it purported to direct you to produce the various records and papers described therein?

Mr. Welles: My advice to Mr. Bevan is that until the Courts otherwise rule, that you decline to answer any and all further questions in this deposition.

Mr. Jackson: I ask the Notary to order the witness to [fol. 129] answer the question.

The Notary: The question is, Mr. Bevan, "You read this subpœna, Exhibit 1, and understood that it purported to direct you to produce the various records and papers de-

scribed therein?" and I, as Notary, now order you to answer the question.

A. I decline to answer on the advice of counsel and I decline to answer any further questions on the advice of counsel.

Mr. Jackson: Now Mr. Notary, we now move for an adjournment of the taking of the depositions until nine o'clock tomorrow morning at the same place described in the notice.

Mr. Welles: We direct the Notary's attention to the fact that there is an application pending before Judge Gosline for an injunction restraining counsel for Plaintiff and restraining the Notary himself from proceeding further with this deposition and we request the Notary to make no order of adjournment which would conflict with Judge Gosline's assignment of that motion for hearing. We make that request on behalf of witnesses and not on behalf of Defendants. We are here to object on the behalf of defendants.

Mr. Jackson: I ask the Notary to enter an order adjourning the taking of these depositions until tomorrow morning at nine o'clock at the same place fixed in the notice.

The Notary: The depositions will be continued until tomorrow morning at nine o'clock.

[fol. 130] As appears in the foregoing transcript of said proceedings, the said Bevan then and there refused to answer as hereinbefore set forth, and for the reasons therein stated, and the undersigned, a Notary Public, in each instance ordered the said witness to answer which he refused to do; and the undersigned, a Notary Public, then and there for the said contempt of the said C. W. Bevan, in refusing to answer each question, and refusing to produce said books, papers and documents, ordered and adjudged that he be imprisoned in the County jail until he submit to testify in the premises.

The undersigned, a Notary Public, adjudges that said questions and said books, papers and documents therein referred to are material to the issues in said cause as appears from the petition filed herein, copy of which is hereto attached marked Exhibit A; and that said books, records and documents are properly and legally described and identified in the subpœna duces tecum which was served on the witness,

C. N. Bevan, on the 7th day of June, 1932, copy of which subpœna duces tecum is hereto attached and marked Exhibit B.

You are, therefore, ordered to arrest and commit the body of said C. N. Bevan to the jail of the said County of Lucas until he shall submit to testify as aforesaid, and of this make legal service and due return.

Given under my hand and official seal this 13th day of June, 1932.

(Signed) William Purcell, Notary Public, Lucas County, Ohio. (Notarial Seal.)

(Rubber stamp:) William Purcell.

[fol. 131] In Court of Appeals of Lucas County, Ohio

C. A. 2691

Ex Parte C. N. Bevan

Amendment to Petition for Writ of Habeas Corpus—Filed June 15, 1932

Now comes petitioner C. N. Bevan and by leave of court files this amendment to his petition for writ of habeas corpus herein and without waiving or in any extent abandoning any allegations in his original petition, alleges:

1. That a true copy of the petition in the cause of Clara Sielcken-Schwarz vs. The Woolson Spice Company, et al., No. 131925 in the Common Pleas Court of Lucas County, Ohio, referred to in petitioner's original petition herein, is hereto attached, marked "Exhibit A", and made a part hereof.

2. That for the reasons set forth in petitioner's original petition herein and for the additional reasons set forth in this amendment to said petition, William Purcell, the Notary Public by whose pretended order your petitioner was arrested and held by the Sheriff of Lucas County, Ohio, had no jurisdiction to take your petitioner's deposition in said cause, to issue a subpœna for your petitioner, to order your petitioner to answer any question or to make any order or

issue any warrant for the arrest or imprisonment of your petitioner until he submit to testify in the premises, or otherwise.

3. Your petitioner respectfully shows the court that the pretended order for the arrest of your petitioner, of which a copy is attached to the petition herein, purports to contain [fol. 132] an attempted adjudication by said Notary Public that your petitioner is guilty of contempt in refusing to answer certain questions and in refusing to produce certain books, papers and documents before said Notary Public, and that said pretended order and attempted adjudication was made by said Notary Public in the absence of your petitioner and without notice to him; that your petitioner was not allowed to appear and defend in person and with counsel against said alleged charge of contempt, and was given no opportunity to demand the nature and cause of the accusation, if any, against him prior to the making of said attempted adjudication by said Notary Public and did not receive and was given no opportunity to demand a copy of the accusation against him prior to said attempted adjudication, and your petitioner was, by said conduct and attempted adjudication of said Notary Public, deprived of his rights under Section 10 of Article I of the Constitution of Ohio and of his rights under the Fourteenth Amendment to the Constitution of the United States; that said Notary Public as shown by his said order of commitment, unlawfully assumed and attempted to exercise judicial power not only by adjudicating that your petitioner was in contempt, as aforesaid, but further by proceeding to "adjudge that said questions and said books, papers and documents therein referred to are material to the issues in said cause as appears from the petition filed" in said cause of Clara Sielcken-Schwarz vs. The Woolson Spice Company et al., and that said Notary Public further illegally and wrongfully attempted to exercise judicial power, as shown in said order of commitment, by adjudging "that said books, records and documents are properly and legally described and identified in the subpœna duces tecum which was served on the witness C. N. Bevan on the 7th day of June, 1932"; that said Notary Public had no jurisdiction to adjudicate [fol. 133] any of said questions; that his attempted adjudication thereof was without hearing or notice to your peti-

tioner; and that said notary public did not submit to the Court of Common Pleas for adjudication and determination the questions as to whether said books, papers and documents which he ordered your petitioner to produce and the questions which he ordered your petitioner to answer are material to any issues in said cause.

4. Said Notary Public, William Purcell, was wholly disqualified to pass judgment or sentence of arrest and imprisonment upon your petitioner for the reason that said Notary Public had been employed by counsel for plaintiff in said suit of Clara Sielcken-Schwarz vs. The Woolson Spice Company, et al., to act as notary and stenographer in the taking of the deposition of your petitioner and the transcribing thereof and that the amount of the compensation of said Notary Public for such service was dependent in large part, if not wholly, upon the number of pages of such testimony or evidence by way of exhibits which he might take and transcribe or copy; that it was to the pecuniary interest of said Notary Public that he should compel your petitioner to testify and produce books, papers and records before him so that such compensation might be earned by said Notary Public, and that said Notary Public was necessarily subject to the bias of his own personal pecuniary interest in determining whether or not a commitment should be issued for the arrest of your petitioner herein and his imprisonment until he submit to testify before said Notary Public, and for said reason said Notary Public's attempted adjudication that your petitioner was in contempt was void, and that said commitment was issued illegally and in violation of the Fourteenth Amendment of the Constitution of the United States.

[fol. 134] 5. That on the 14th day of June, 1932, after the Honorable Robert A. Gosline, Judge of the Court of Common Pleas of Lucas County, Ohio, before whom were pending the motions for injunction, etc., referred to in your petitioner's petition herein, had been informed that this proceeding in habeas corpus was to be filed herein, announced that he would overrule said motions for injunction unless they were voluntarily withdrawn by the defendants in said cause who had filed same and thereupon said motions were withdrawn by said defendants.

6. Your petitioner says that the only color of authority which said William Purcell had for the issuance of the order of commitment of your petitioner is by virtue of the provisions of Sections 11510, 11511 and 11512 of the General Code of the State of Ohio; that if said sections or any of them are or can be construed to authorize the issuance of the order of commitment herein by said William Purcell as Notary Public and the arrest and imprisonment of your petitioner by the Sheriff of Lucas County, Ohio, in pursuance of such order of commitment, then said sections of the statutes and each of them are void and unconstitutional by reason of the provisions of Section 1 of Article I, Section 5 of Article I, Section 10 of Article I, Section 14 of Article I, Section 16 of Article I, Section 1 of Article IV and Section 32 of Article II of the Ohio Constitution and the Fourteenth Amendment of the Constitution of the United States, and are wholly ineffective to invest said Notary Public with lawful power or jurisdiction to take such actions and proceedings or any of them.

Wherefore your petitioner prays as in his petition herein.
Marshall, Melhorn, Marlar & Martin, Tracy, Chapman & Welles, Attorneys for Petitioner.

[fol. 135] *Duly sworn to by C. N. Bevan. Jurat omitted in printing.*

[fol. 136] EXHIBIT "A" TO AMENDMENT TO PETITION

IN COURT OF COMMON PLEAS OF LUCAS COUNTY

No. 131,925

CLARA SIELCKEN-SCHWARZ, New York, N. Y., Plaintiff,

v.

THE WOOLSON SPICE COMPANY, a Corporation, 2700 Summit Street, Toledo, Ohio; John W. Koehrman, 1719 Superior Street, Toledo, Ohio; Franklin H. Biggs, 2613 Glenwood Avenue, Toledo, Ohio; Marion M. Miller, 2260 Scottwood Avenue, Toledo, Ohio; Frank D. Stranahan, Dixie Highway, Toledo, Ohio; Robert A. Stranahan, Ottawa Hills, Toledo, Ohio; Ammi F. Mitchell, 2057 Glenwood Avenue,

Toledo, Ohio, and LeRoy E. Eastman, 3416 Brookside Road, Toledo, Ohio, as Administrators of the Estate of William A. Brigham, Deceased; Irving Trust Company, a Foreign Corporation, as Executor of the Last Will and Testament of Herman Sielcken, Deceased, Society for Savings Building, Cleveland, Ohio, Defendants

PETITION FOR EQUITABLE RELIEF

The above named plaintiff, Clara Sielcken-Schwarz, for her cause of action against the above named defendants respectfully alleges and shows:

[fol. 137] 1. That the plaintiff, Clara Sielcken-Schwarz, at and prior to the time of the commencement of this action, was and now is a citizen of the United States and a resident of the State of New York, residing in the City and County of New York in said State.

2. That the defendant, Irving Trust Company, is a corporation duly organized and existing under and by virtue of the laws of the State of New York and has its principal place of business in New York City in said State; that said corporation is duly qualified to do business in Ohio and has appointed a statutory agent pursuant to the Ohio statutes and that said corporation is doing business in this State.

3. That the defendant, The Woolson Spice Company, at all times hereinafter mentioned was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and has its principal place of business at the City of Toledo, in said State; that at all times prior to, on or about July 25th, 1918, the total capital stock of said corporation consisted of 1,800 shares of common stock of a par value of One Hundred Dollars ($100.00) per share.

4. That the defendants, John Koehrman, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan and Robert A. Stranahan, are citizens and residents of the City of Toledo, County of Lucas, State of Ohio, and that the defendants Ammi F. Mitchell and Leroy E. Eastman are the duly qualified and acting administrators of the estate of William A. Brigham, deceased, who at the time of his death

was a resident of the City of Toledo, County of Lucas, State of Ohio.

5. That Herman Sielcken, who was a citizen of the United States and domiciled in the City, County and State of New York, died on or about the 8th day of October, 1917, leaving a last Will and Testament wherein he appointed The Columbia-Knickerbocker Trust Company, a corporation [fol. 138] organized and existing under the laws of the State of New York, Executor of his said Will; that thereafter and on or about the 25th day of January, 1918, the said Will was duly admitted to Probate by the Surrogates Court of the County of New York, State of New York, and letters testamentary on the said Will were thereupon duly issued by one of said Surrogates to The Columbia Trust Company, a corporation organized and existing under the laws of the State of New York, as the successor of said The Columbia-Knickerbocker Trust Company; that thereafter and prior to the commencement of this action the defendant, Irving Trust Company, by certain mesne changes of corporate name, became and now is the continuation of the corporate entity and identify of said Columbia Trust Company and thereupon became the duly qualified and acting Executor of said Last Will; that the defendant, Irving Trust Company, has never been discharged as such Executor and that no other individual or corporation has been appointed Executor of said Last Will or administrator of the estate of said Herman Sielcken by said Surrogates Court or by any other court.

6. That said Herman Sielcken, in and by his Last Will and Testament, after providing certain specific legacies all of which have been fully paid and satisfied, gave, devised and bequeathed all the rest, residue and remainder of his property and estate, real and personal, whatsoever and wheresoever situate, absolutely to his wife, Clara Sielcken (by subsequent remarriage Clara Sielcken-Schwarz) who is the plaintiff herein, and that said plaintiff is now the full, complete, absolute and sole beneficial owner of all unadministered and undistributed assets of the estate of said Herman Sielcken.

7. That since the death of the said Herman Sielcken the plaintiff remarried and her present name is Clara Sielcken-Schwarz.

8. That heretofore and prior to the commencement of this action, the plaintiff duly requested the defendant, Irving Trust Company, as Executor of the Last Will and Testament of said Hermann Sielcken, deceased, to bring [fol. 139] this action in behalf of said estate and sought to persuade said defendant so to do, but that the said defendant has failed, neglected and refused to bring said action, and, therefore, this plaintiff has joined said Irving Trust Company, as such Executor, as a defendant in this action.

9. That at the time of his death said Herman Sielcken was the sole beneficial owner of 824 shares of the capital stock of the defendant, The Woolson Spice Company, said shares being registered on the books of the said corporation in the name of Crossman & Sielcken, under which name the said Hermann Sielcken carried on business; that in addition to said 824 shares there was registered on the books of the said corporation in the name of said Hermann Sielcken, 360 of said shares.

10. That on the 6th day of April, 1917, the Congress of the United States declared that a state of war existed between the United States and Germany and on the 6th day of October, 1917, the Congress of the United States enacted and the President approved the Act known as "The Trading with the Enemy Act."

11. That said Hermann Sielcken at the outbreak of war between the United States and Germany was, as the defendants and said William A. Brigham well knew, temporarily present in Germany on business in behalf of the defendant, The Woolson Spice Company.

12. Plaintiff is informed and believes that the said Herman Sielcken, in the year 1909 acquired by purchase thereof 1,739 shares of the common capital stock of the defendant, The Woolson Spice Company, out of the said total capitalization of 1,800 common shares; that said Hermann Sielcken from the year 1909 until in or about the month of September, 1917, was president and a director of the defendant, The Woolson Spice Company; that subsequent to the purchase by him of said 1,739 shares, said Hermann [fol. 140] Sielcken from time to time sold certain of said shares to various persons including the defendants, Koehrman and Biggs, and said William A. Brigham, but for a

large portion of said shares so sold said Hermann Sielcken did not receive prior to his death the purchase price, including the purchase price of the shares sold to said defendants, Koehrman and Biggs, and said Brigham, and held said shares so sold as collateral to secure the purchase price thereof; that prior to the ousting of said Hermann Sielcken as president of the defendant, The Woolson Spice Company, as hereinafter more specifically related, the said Brigham was secretary and a director, the defendant Koehrman was general manager and a director, and the defendant Biggs was superintendent and a director of the defendant, The Woolson Spice Company, and were intimately associated in the conduct of the affairs of said corporation with said Hermann Sielcken, who, as hereinbefore stated, owned or controlled a majority of the capital stock thereof and by reason of such control maintained the defendants, Koehrman and Biggs, and said Brigham, in their said positions; that because of their intimate association and acquaintance with the business of the defendant, The Woolson Spice Company, over a period of many years, the defendants, Koehrman and Biggs, and said Brigham were informed upon every detail of said business and well knew the prosperous condition of the affairs of the said corporation.

13. Plaintiff is informed and believes that in or about the month of September, 1917, it being well known to the defendants, Koehrman and Biggs, and said Brigham, that the said Hermann Sielcken was being detained in Germany by the exigencies of the said war between the United States and Germany, that the said Hermann Sielcken was then suffering from a prolonged and serious illness which prevented him from traveling, that even in the event of peace [fol. 141] between the United States and Germany his illness would indefinitely prevent him from returning to his domicile in the United States and that it would be impossible for him to frustrate their plans, said defendants, Koehrman and Biggs, and said Brigham, impelled by motives of avarice, ambition and hatred toward Hermann Sielcken, and in furtherance and as a part of a fraudulent conspiracy (conceived among them during the spring and summer of 1917) illegally and wrongfully to acquire the control of said The Woolson Spice Company from said Hermann Sielcken, and otherwise to defraud him and to

dominate, manage, control, manipulate and exploit said corporation in their own interests, caused to be held a pretended meeting of the Board of Directors of the defendant, The Woolson Spice Company, and by means of their control of the said Board of Directors in the absence of said Hermann Sielcken and without his knowledge or authority wrongfully and fraudulently ousted the said Hermann Sielcken from his office as President of defendant, The Woolson Spice Company, and also wrongfully and fraudulently ousted from his office as Treasurer of defendant, The Woolson Spice Company, one, S. P. Jermain, who, in his capacity as said Treasurer, for many years had been a trusted and loyal representative, associate and adviser of the said Hermann Sielcken, and proceeded to a pretended election of the said Brigham as President of defendant, The Woolson Spice Company; that thereafter and at all times mentioned herein and as a result of the aforesaid wrongful acts, the defendants, Koehrman and Biggs, and said Brigham controlled and dominated the defendant, The Woolson Spice Company, and controlled and regulated the public and private reports of its business, general condition and ownership of its stock, and did fraudulently manipulate the defendant, The Woolson Spice Company, and said reports for their own purposes, as here-
[fol. 142] inafter more specifically set forth.

14. Plaintiff is informed and believes that in justification of their action in ousting Sielcken and seizing control of The Woolson Spice Company and as a further step in the consummation of the said fraudulent conspiracy, the defendants, Koehrman and Biggs, and said Brigham, although they well knew that said Hermann Sielcken in his lifetime and at the time of his death was a citizen of the United States and domiciled in the City, County and State of New York and was not an enemy within the meaning of that term as defined in the "Trading with the Enemy Act", and although they well knew that said Hermann Sielcken had died on October 8, 1917, and that title to all his property in the United States had vested in The Columbia Trust Company as Executor, falsely and maliciously caused to be publicly announced and reported to the Alien Property Custodian that the said Hermann Sielcken was a resident of Germany and an enemy of the United States under the provisions of said "Trading with the Enemy Act", and

that said Hermann Sielcken was the owner of the shares of stock of said Woolson Spice Company hereinbefore mentioned; that the said defendants and said Brigham, by said false and malicious reports, intended to conceal and distract attention from their wrongful and fraudulent seizure of the control of The Woolson Spice Company in their own interests and hoped thereby to perpetuate and render easier and less likely of discovery their management, control, manipulation, and exploitation of said corporation in their own interests.

15. That upon the qualification of the said Columbia Trust Company as Executor of the said last Will and Testament of the said Hermann Sielcken and for the purposes of the due administration and distribution of said estate, title to the said 824 shares of stock of the defendant, The [fol. 143] Woolson Spice Company, and title to the interest of said Hermann Sielcken in said 360 shares of said stock, vested in said Columbia Trust Company as such executor.

16. Plaintiff is informed and believes that prior to or shortly after the appointment of The Columbia Trust Company as executor as aforesaid, the defendants, Koehrman and Biggs, and said Brigham broadened and enlarged the scope of their fraudulent conspiracy to include a plan to acquire the said 824 shares and the said 360 shares of the capital stock of the defendant, The Woolson Spice Company, for a grossly inadequate consideration for themselves and the defendants, Miller, Frank D. Stranahan and Robert A. Stranahan, to whom the said plan was communicated and who aided, abetted and participated in said fraudulent plan.

17. Plaintiff is informed and believes that in furtherance of said fraudulent conspiracy, wrongfully and illegally to acquire said stock at a grossly inadequate consideration, the defendants, Koehrman and Biggs, and said Brigham aided and abetted by sundry other persons, and taking advantage of their wrongful control and domination over the affairs of the defendant, The Woolson Spice Company, and taking advantage of their peculiar and superior knowledge of the affairs of said Company and of the necessity of the said Executor to rely upon them for information concerning the business of said Company, carried on a cam-

paign of misrepresentation calculated and designed to mislead and deceive the said Executor as to the value of said stock and as to the necessity of an immediate sale to avoid practically total loss. Plaintiff is further informed and believes that as part of said campaign of misrepresentation said individual defendants and said Brigham falsely and fraudulently misrepresented to said Columbia Trust Com-
[fol. 144] pany, as such Executor, that said stock was of small and constantly decreasing value, although in truth and in fact, as such defendants and said Brigham well knew, said stock was of a value of upwards of $2,000.00 per share and was constantly appreciating in value, that the fact that the Estate of Hermann Sielcken, who said defendants falsely and wrongfully asserted had been an alien enemy, owned the said 824 shares of stock which had theretofore been transferred into the name of said Trust Company as such Executor, had seriously injured and was progressively injuring the business of the defendant, The Woolson Spice Company, that such circumstances had seriously depreciated and was progressively depreciating the value of said stock, that an immediate sale was necessary to save the business from destruction, that orders were being cancelled daily, that unless an immediate sale were made the said stock could not be sold at all and that only a very small amount could then be realized through liquidation. Plaintiff is further informed and believes that the individual defendants and said Brigham well knew that the business of the defendant, The Woolson Spice Company, had not been injured and depreciated, but on the contrary was in a very prosperous condition, that the volume of said business had largely increased over the preceding year, that said Company had large contracts for furnishing coffee, spices and supplies to the armies of the United States, that unusual profits were anticipated, and that said stock had not depreciated in value, but on the contrary, would, as the individual defendants and said Brigham well knew, be largely increased in value so soon as the secret knowledge of such defendants and said Brigham as to the increased business and the prosperity of the defendant, The Woolson Spice Company, should become known to the public generally. Plaintiff is further informed and believes that said false and wrongful misrepresentations were

[fol. 145] intended to and did cause said Columbia Trust Company, as such Executor, which was unfamiliar with the affairs and business of said corporation, and which necessarily as a fiduciary stockholder of such corporation relied upon the reports, statements and representations of the defendants and said Brigham, who were the managing officers and directors of said corporation as aforesaid, as to the condition of its affairs, to believe that it would be impossible to secure a substantial price for the said stock, that said stock had greatly depreciated in value and was constantly depreciating in value, and that an immediate sale of said stock was necessary to avoid a total loss of said asset of the said estate. Plaintiff is further informed and believes that as a result of the aforesaid misrepresentations so relied upon the Executor was fraudulently induced to sell said stock to the individual defendants and said Brigham for a grossly inadequate price, as hereinafter more particularly set forth.

18. Plaintiff is informed and believes that in furtherance of said conspiracy the individual defendants and said Brigham, conspiring among themselves and with sundry other persons, falsely and fraudulently represented to and advised The Columbia Trust Company that any publicity regarding a sale of said shares or any attempt to obtain purchasers for said shares, other than said individual defendants and said Brigham, would react disastrously on the business of said Woolson Spice Company and the value of said shares; that thereby said Columbia Trust Company, as such Executor, was misled and induced to refrain from calling said shares to the attention of other persons who might be interested therein as purchasers and to refrain from advertising the fact that said shares of stock were for sale, and was thereby misled into making a hurried sale of said shares to said defendants Koehrman, Biggs, Miller, [fol. 146] Frank D. Stranahan and Robert A. Stranahan and to said Brigham, without competition, publicity or adequate advertising in the press, for a grossly inadequate price; that said defendants and said Brigham, who were the directors and managing officers of The Woolson Spice Company, and the other individual defendants associated with them in said fraudulent conspiracy, took advantage of the peculiar knowledge of said officers as to the prosper-

ity of the defendant, The Woolson Spice Company, and the value of its stock, to acquire the shares of such fiduciary stockholder, The Columbia Trust Company, for a grossly inadequate price.

19. Plaintiff is informed and believes that in furtherance of said conspiracy the defendants, Koehrman and Biggs, and said Brigham conspiring among themselves and sundry other persons, falsely and fraudulently represented to and threatened The Columbia Trust Company that unless said shares were immediately sold to the individual defendants and said Brigham at a price fixed by them or if said shares were sold to any other person or persons, then they, the managing officers and directors of the defendant, The Woolson Spice Company, would forthwith leave the employ of said corporation and involve it in immediate disaster and ruin; that thereby said Columbia Trust Company, as such executor, was misled and wrongfully coerced into making a hasty sale of said shares to the said individual defendants and to said Brigham at a grossly inadequate price fixed by them and upon their own terms and without attempting to obtain bids from other possible purchasers.

20. Plaintiff is informed and believes that as part of and in furtherance of said conspiracy to acquire said shares at a grossly inadequate price, the defendants, Koehrman and Biggs, and said Brigham falsely and fraudulently mis- [fol. 147] represented the condition of said Company to other prospective purchasers of said stock and attempted to and did effectively fore*close* competition by such misrepresentation and by making threats to prospective purchasers that if such prospective purchasers competed with the individual defendants and said Brigham in the matter of the acquisition of said shares, then the management of the defendant, The Woolson Spice Company, would immediately quit and involve the corporation in chaos and ruin.

21. Plaintiff is informed and believes that in furtherance of said fraudulent conspiracy the defendants, Koehrman and Biggs, and said Brigham attempted to conceal from said Columbia Trust Company, and as officers and directors of defendant, The Woolson Spice Company, prevented said corporation from disclosing to The Columbia Trust Company the existence of an alleged claim in favor of the de-

fendant, The Woolson Spice Company, or that said corporation asserted an alleged claim against the estate of Hermann Sielcken in a sum in excess of Nine Hundred Thirty-two Thousand Dollars ($932,000.00). Plaintiff is further informed and believes that when prior to the said sale of said shares of The Woolson Spice Company to the individual defendants and said Brigham, The Columbia Trust Company, as such Executor, learned of the existence of said alleged claim from other sources, said individual defendants and said Brigham falsely and fraudulently represented to and assured The Columbia Trust Company that said alleged claim had little if any merit and that a recovery thereon, if any, would be of a negligible amount, although said individual defendants and said Brigham then believed they could and intended to take advantage of the [fol. 148] death of Hermann Sielcken, the circumstance that they were the sole survivors who had personal knowledge of many of the relations between the defendant, The Woolson Spice Company, and Hermann Sielcken in his life time, and their complete domination and control over the defendant, The Woolson Spice Company, its books, papers and records to enable said defendant, The Woolson Spice Company, through their connivance and assistance successfully to prosecute such alleged claim and recover from the estate of Hermann Sielcken a sum in excess of Nine Hundred Thirty-two Thousand Dollars ($932,000.00), and further falsely and fraudulently represented to and assured The Columbia Trust Company that neither they nor the defendant, The Woolson Spice Company, had any intention to assert said alleged claim against the estate of Hermann Sielcken, either presently or after the sale of said shares, although said individual defendants and said Brigham well knew that the defendant, The Woolson Spice Company, was at the time of such representations and assurances intending and planning to assert said claim as soon as the sale of said shares should be consummated, and although said individual defendants and said Brigham, as officers, directors, shareholders and prospective shareholders of defendant, The Woolson Spice Company, were at the time of making such representations and assurances intending to force and compel the defendant, The Woolson Spice Company, to assert said alleged claim as soon as the sale of

said shares should be consummated. Plaintiff is further informed and believes that the individual defendants and said Brigham, by means of such and sundry other false and deceitful representations, assurances and advices, misled, induced and wrongfully prevailed upon The Columbia Trust Company as such Executor, to make a hurried sale of such shares to the individual defendants and to said [fol. 149] Brigham without asking an adequate or thorough investigation of said alleged claim, or without judicially determining or settling the same. Plaintiff is further informed and believes that said individual defendants and said Brigham so attempted to conceal such alleged claim, so prevented The Woolson Spice Company from divulging the same, made such false representations and deceitful assurances and caused said corporation to delay asserting said alleged claim against the estate of said Herman Sielcken until after the consummation of said sale in order that the value of said shares might not thereby be increased because of the existence of said alleged claim or by the fruits thereof, should the same be settled or judicially determined prior to said sale. Plaintiff is further informed and believes that the defendant, The Woolson Spice Company, aided and abetted the individual defendants and said Brigham in consummating said conspiracy to purchase the aforesaid shares for a grossly inadequate price, actively participated therein and delayed asserting said alleged claim against the estate of Hermann Sielcken in order that the individual defendants and said Brigham might acquire the controlling interest in said corporation prior to the assertion of said alleged claim, in the expectation and with the purpose of thereby more effectively prosecuting said claim against the estate of said Hermann Sielcken. Plaintiff is further informed and believes that subsequent to the sale of said shares the said individual defendants and said Brigham caused the defendant, The Woolson Spice Company, to assert and the said corporation did assert the said claim against the said estate and instituted an action in the Supreme Court of the State of New York against said Columbia Trust Company as such Executor, to recover said amount, and that thereafter such proceedings were had in the said action that said Columbia

Trust Company, as such executor, settled and compromised [fol. 150] the said claim by the payment to the defendant, The Woolson Spice Company, of the sum of Two Hundred Eighty-four Thousand Six Hundred Eighty-nine and 16/100 Dollars ($284,689.16) from the funds of the estate, no part of which sum was taken into consideration on arriving at the value of said stock.

22. Plaintiff is informed and believes that, it being well known to said individual defendants and to said Brigham that certain loyal personal and business friends, associates and trusted advisers of the said Hermann Sielcken, including John Doyle, general counsel and former director of the defendant, The Woolson Spice Company, and Joseph Picksley, director and stockholder of The Woolson Spice Company, would exert their powers and influence to prevent a sale of said shares at the grossly inadequate price of approximately Six Hundred Eighty Dollars ($680.00) per share contemplated by said individual defendants and said Brigham and it being feared by said individual defendants and said Brigham that if said friends, associates and advisers of the said Hermann Sielcken were forewarned of said sale and said proposed price they might thwart said conspiracy by correctly informing the Columbia Trust Company as to the value of said shares and as to the existing and expected prosperity of The Woolson Spice Company, and by informing it of other persons who would be interested in purchasing said shares, the said individual defendants and said Brigham, in furtherance of said fraudulent plan to acquire said stock and conspiring among themselves and with sundry other persons, concealed from the said friends, associates and advisers of Hermann Sielcken the facts that said shares of stock were for sale and that they contemplated purchasing the same, the price which they planned to pay for said shares and all the details arranged in connection with said sale as hereinabove and hereinafter more specifically set forth, and by means of the aforesaid and sundry other false and deceitful misrepre- [fol. 151] sentations, advices, assurances, concealments and threats, induced The Columbia Trust Company, as such executor, to conceal said facts, price and details from the said friends, associates and advisers of Hermann Sielcken.

23. Plaintiff is informed and believes that in consummation of said conspiracy the individual defendants and said Brigham, aided and abetted by sundry other persons, by means of the aforesaid false and deceitful misrepresentations, advices, assurances, concealments and threats, induced The Columbia Trust Company, as such Executor, to enter into a private agreement to sell said shares to the individual defendants and to said Brigham at the grossly inadequate price of $680.00 per share, although, as said defendants and said Brigham well knew, the market value of said stock was approximately $2,000.00 per share.

24. That thereafter, as plaintiff is informed and believes, the individual defendants and said Brigham, conspiring among themselves and with sundry other persons, coerced and misled the Executor into consenting to a pretended auction sale (at which in fact competitive bidding had been foreclosed as hereinafter set forth for the purpose of concealing the private contract of purchase of said shares of The Woolson Spice Company which said individual defendants and said Brigham had obtained through the fraud, deception and coercion practiced upon said Executor and to create an appearance that said sale rested upon a public auction in the hopes of foreclosing inquiry into the private contracts of sale so effectuated through the fraud of said individual defendants and said Brigham.

25. Plaintiff is informed and believes that shortly prior to the 24th day of July, 1918, said individual defendants and said Brigham were advised by The Columbia Trust [fol. 152] Company that said 824 shares and said 360 shares would be put up for sale at auction in the City of New York on July 24, 1918, that thereupon in furtherance of said conspiracy and for the purpose of chilling the bidding at said auction sale, said individual defendants, said Brigham and sundry other persons, each of whom was a prospective bidder for said shares, and all of whom were aided and abetted by sundry other persons, wrongfully and fraudulently agreed among themselves that one of their number, to-wit, the defendant, Marion M. Miller, would bid for and purchase said shares without competition from the other individual defendants and said Brigham and said other persons and that upon the acquisition of said shares by the said Marion M. Miller, the same should be divided among

said individual defendants, said Brigham and said other persons; that in compliance with said wrongful agreement the defendant, Marion M. Miller, attended said auction sale and purchased said shares without competition at a grossly inadequate price, said other individual defendants, said Brigham and other persons, in accordance with said agreement, refraining from bidding therefor, and that forthwith said shares were divided among the said conspirators as theretofore agreed upon.

26. Plaintiff is informed and believes that in order to further wrongfully chill the bidding at said auction sale said individual defendants and said Brigham conspiring among themselves and sundry other persons, by means of the aforesaid false and malicious -representations, assurances, advices, concealments and threats, induced The Columbia Trust Company, as such Executor, to refrain from making any extensive or adequate advertising of said auction and to make certain special arrangements and agreements with them as to the terms of said auction sale, to-wit, that said individual defendants, and said Brigham were to be permitted to make a deposit of $100,000.00 with The Columbia Trust Company as a down payment on said shares and were to be allowed thirty days after said [fol. 153] auction within which to pay the balance of their purchase price, whereas, the public and all other prospective purchasers were to be required to deposit 10% of their bids with the auctioneer at the time of the sale, and to pay the balance thereof to such auctioneer before one o'clock on the day following said sale.

27. Plaintiff is informed and believes that on or about the 24th day of July, 1918, said Columbia Trust Company, as such Executor, misled, deceived and coerced by the aforesaid false and malicious misrepresentations, assurances, advices, concealments and threats of said individual defendants and said Brigham, put up the said 824 shares and said 360 shares at auction in the City of New York, and, without adequate notice or advertisement of said sale, sold said 824 shares and said 360 shares without competition to the defendant, Marion M. Miller, on behalf of himself and said other individual defendants and said Brigham, at the terms theretofore agreed upon as aforesaid at the price of Six Hundred Eighty Dollars ($680.00) per share, although

the said individual defendants and said Brigham knew that the market value of said stock was approximately Two Thousand Dollars ($2,000.00) a share.

28. That thereafter the said Columbia Trust Company, as such Executor, still being misled, deceived and coerced by the aforesaid false and malicious misrepresentations, assurances, advices, concealments and threats of the individual defendants and said Brigham, caused to be presented to the defendant, The Woolson Spice Company, certificates for the said shares of stock, and said defendant, The Woolson Spice Company, with full knowledge that the transfer of said stock was the consummation of a gross fraud upon said Executor by the individual defendants and said Brigham, and with the expectation of deriving certain improper and unjustifiable benefits therefrom, as hereinbefore more [fol. 154] particularly set forth thereupon actively aided, abetted and participated in the consummation of said fraud and wrongfully and illegally transferred said stock into the names of the individual defendants and said Brigham and/or their nominees and caused certificates therefor to be issued and delivered accordingly.

29. Plaintiff is informed and believes that prior to the purchase of said shares as aforesaid and in furtherance of said conspiracy to acquire the same at a grossly inadequate price, the said individual defendants and said Brigham having insufficient means with which to effect said purchase without assistance, knowing full well that the defendant, The Woolson Spice Company, was in a position to make a large cash distribution by way of dividends and/or to borrow large sums from sundry financial institutions, and taking advantage of their peculiar knowledge of the condition and affairs of the defendant, The Woolson Spice Company, and of their control and domination over said corporate defendant as aforesaid, conspired and arranged with the defendant, The Woolson Spice Company, and sundry other persons that upon the consummation of the aforesaid sale the defendant, The Woolson Spice Company, would procure and advance and/or distribute to the individual defendants and to said Brigham sufficient funds with which to pay for said shares; that the aforesaid arrangement was concealed from The Columbia Trust Company as such executor, it being led to believe by the individual defendants and said

Brigham as aforesaid that the defendant, The Woolson Spice Company, was without excess assets and had a restricted and weak credit and that its prospective earning capacity was rapidly declining; that because of such concealments and misrepresentations The Columbia Trust Company, as such Executor, was induced to make said sale [fol. 155] as hereinabove set forth; that shortly after the sale of said shares as aforesaid and prior to the payment of the purchase price thereof, the defendant, The Woolson Spice Company, procured and distributed and/or advanced to the individual defendants and to said Brigham a sum or sums of money sufficient to pay the purchase price of said shares as theretofore arranged as aforesaid between the defendant, The Woolson Spice Company, and said individual defendants and said Brigham with the help and assistance of sundry other persons.

30. That since said issue and delivery of said certificates to said individual defendants and said Brigham and/or their nominees, the defendant The Woolson Spice Company has paid sundry dividends to said individual defendants, said Brigham, their nominees and transferees in stock and money, no part of which has been paid to the Executor of the estate of Hermann Sielcken or to any beneficiary of that estate; and that the plaintiff, as the residuary legatee and beneficiary of said estate, has been thereby deprived by the said fraud and wrongdoing of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, of the said 824 shares of stock and of the dividends declared and paid thereon, or of a large sum of money representing the fair market value of said stock and the amount or value of said dividends with interest from the date of payment.

31. That the said fraud and unlawful acts of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, hereinbefore more particularly set forth were not discovered by the plaintiff until about March, 1931, and, on information and belief, were not discovered by the defendant, Irving Trust Company, until on or about said date.

32. Plaintiff is ready, able and willing to pay to the defendants or any one of them, such sum or sums of money, if any, as this Court may determine is due and owing to any

[fol. 156] or all of the individual defendants or to the defendant administrators of the estate of said Brigham, by reason of the payment by them and said Brigham of the aforementioned sums as purchasers of said shares, or plaintiff is ready and willing to have this Court set off against any sum which it may determine to be due and owing to plaintiff or to the Irving Trust Company, as such Executor, by any of the defendants any sum which the said defendants or said Brigham may have paid as purchasers of said stock.

33. That the plaintiff is without adequate remedy at law.

Wherefore the plaintiff prays:

1. That the defendant, The Woolson Spice Company, be required to account to the plaintiff for the said 824 shares of its common capital stock or such shares as the said 824 shares of stock may represent in any recapitalization of said Company which may have occurred since the sale of said 824 shares and register the plaintiff, upon its books as the owner of said stock, and issue to her certificates for said shares of stock.

2. That in the event that The Woolson Spice Company does not have in its treasury or under its control sufficient shares of stock to enable it to issue to the plaintiff certificates for said shares of stock, that the Court require the defendant, The Woolson Spice Company, the individual defendants herein and said defendant administrators, Ammi F. Mitchell and Leroy E. Eastman to pay to said plaintiff the reasonable value of said shares of stock or the reasonable value of such shares of stock as may be represented by said 824 shares in any recapitalization of said corporation.

3. That the defendant, The Woolson Spice Company, the individual defendants and said defendant administrators be required by the decree of this court to account to the plaintiff for all dividends which have accumulated and/or been paid upon said 824 shares of stock since July 25, 1918, or [fol. 157] upon any stock represented by said 824 shares of stock in any recapitalization of said corporation, together with interest upon said dividends from the date of payment thereof.

4. That the individual defendants, said defendant administrators and each of them be required by order of this Court to produce and surrender for cancellation any certificates issued in their names or in the name of William G. Brigham for any of said 824 shares of stock or for any shares of stock represented by said 824 shares in said recapitalization of said corporation.

5. That the individual defendants, said defendant administrators and the defendant, The Woolson Spice Company, be enjoined, except under order of this Court first having been obtained, from transferring any of its shares of stock or from issuing certificates for further shares of stock and from changing in any way its present capital structure.

6. That the plaintiff have such other and further relief in the premises as the Court may deem meet and just.

(Signed) Baker, Hostetler, Sidlo & Patterson,
(Signed) Fraser, Hiett, Wall & Effler, Attorneys for the Plaintiff.

Duly sworn to by Clara Sielcken-Schwarz. Jurat omitted in printing.

[fol. 158] In Court of Appeals of Lucas County, Ohio

Ex Parte C. N. Bevan

Writ of Habeas Corpus—Filed June 15, 1932

State of Ohio,
Lucas County, ss:

To Joseph Zimmerman, Sheriff of Lucas County, Ohio:

We command you that the body of C. N. Bevan, in your custody detained and restrained of his liberty, as it is said, you take and have before the Court of Appeals of Lucas County, Ohio, or before one of the judges of said court, at the courtroom of said court in the courthouse of said county, on the 15th day of June, 1932, at 9:30 A. M. o'clock, to do and receive what said court or said judge

shall then and there consider, concerning him in that behalf; and have you then and there this writ.

In witness whereof I, George E. Hardy, Clerk of said Court of Appeals, have hereunto set my hand and affixed the seal of said court this 14th day of June, 1932.

(Signed) Geo. E. Hardy, Clerk; by (Signed) M. E. Theuerkauff, Deputy Clerk.

Sheriff's Return

Received this writ June 14th, 1932, at 10:45 A. M., and, pursuant to its command, I do now have, this 15th day of June, 1932, at 9:30 A. M., the body of C. N. Bevan before the Court of Appeals of Lucas County, Ohio.

I certify that the cause and reason for my having the said C. N. Bevan in custody arises from and is because of a writ and commitment papers issued and delivered to me by William Purcell, Notary Public, Lucas County, Ohio, which said writ and commitment papers I hereto attach and make a part hereof as completely as though fully rewritten herein.

Joseph Zimmerman, Sheriff, by (Signed) Rolland Staggemeier, Deputy.

Costs: $.91.

[fol. 159] For the "writ and commitment papers" referred to in the foregoing Sheriff's Return, see the Order of Commitment attached as an exhibit to the pleading bearing the title "Petition for Writ of Habeas Corpus," filed in the Court of Appeals of Lucas County, Ohio on June 14, 1932, which Order of Commitment appears in full at pages 107 to 130, supra, of this Transcript and is here incorporated by reference thereto as fully as if repeated verbatim.

The Sheriff's Return of service of said Order of Commitment, endorsed thereon, is as follows:

Sheriff's Return

Received this writ June 14, 8:30 A. M., and, pursuant to its command, I did arrest the within named C. N. Bevan June 14, 1932, 9:10 A. M., and produced him before the Court of Appeals, Lucas County, Ohio.

Joseph Zimmerman, Sheriff. Rolland Staggemeier, Deputy.

Costs: $.91.

[fol. 160] In Court of Appeals of Lucas County, Ohio

C. A. No. 2691

Ex Parte C. N. Bevan

Recognizance—Filed June 17, 1932

The State of Ohio,
Lucas County, ss:

Be it remembered that on June 14th, 1932, C. N. Bevan personally appeared before this court, and acknowledged himself to owe the State of Ohio the sum of One Hundred Dollars ($100.00), to be levied of his goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such that if the above bound C. N. Bevan be and appear before this Court of Appeals, on the fifteenth day of June, 1932, and abide the judgment of this court, and not depart without leave, then this recognizance shall be void; otherwise it shall be and remain in full force and virtue in law.

(Signed) C. N. Bevan.

Taken and acknowledged before me on the day and year above written. George E. Hardy, Clerk of the Court of Appeals.

[fol. 161] In Court of Appeals of Lucas County, Ohio

No. 2691

Ex Parte C. N. Bevan

Motion for New Trial—Filed June 22, 1932

Now comes the petitioner, C. N. Bevan, and moves the Court to vacate and set aside the findings and judgment of the Court herein, and for a new trial of this cause for the following reasons materially affecting the substantial rights of such petitioner:

(1) The Court erred in not finding and adjudging that petitioner was unlawfully deprived of his liberty, and in not discharging him.

(2) The Court erred in re-committing and remanding petitioner to the custody of the respondent.

(3) The finding, decision and judgment of the Court are contrary to law.

(4) The finding, decision and judgment of the Court are not sustained by sufficient evidence.

(5) The finding, decision and judgment of the Court are erroneous, in that there is no evidence to sustain them.

(6) The Court erred in not finding and adjudging that the order of commitment under which petitioner was imprisoned by the respondent was void and of no effect.

(7) The Court erred in not finding and adjudging that the petition of the plaintiff in the case in which it was attempted to take said depositions, viz: Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, v. The Woolson Spice Company, et al., defendants, stated no cause of action whatever and tendered no issue whatever and that no evidence attempted to be taken by said depositions, no questions asked of the petitioner, and no books, papers or documents which it was attempted to require him to produce could or would be relevant or material to any issue whatever under said alleged petition or in said alleged action, and that therefore the action of the notary public in ordering [fol. 162] petitioner to answer any questions or to produce any books, papers or documents, and the action of the Notary in attempting to adjudge that any such questions and any such books, papers and documents were material to any issue in said case, and the action of said notary in attempting to adjudge that petitioner was in contempt and in issuing a commitment for petitioner and bringing about his arrest and detention violated the provisions of Sections 1 and 16 of Article I of the Ohio constitution, and the provisions of the Fourteenth Amendment to the Constitution of the United States, and were illegal, null and void.

(8) The Court erred in not finding and adjudging that the petition of the plaintiff in said Case No. 131,925 in the

Court of Common Pleas of Lucas County, Ohio, in which it was attempted to take said depositions, affirmatively showed that said plaintiff had no capacity or right whatever to bring or prosecute said action, or to cause the taking of any depositions at all therein, or to enforce the attendance or testimony of any witnesses or the production of any books, papers or documents, and that by reason thereof the action of said notary public in ordering petitioner to answer any questions or to produce any books, papers or documents, and the action of the notary in attempting to adjudge that any such questions and any such books, papers and documents were material to any issue in said case, and the action of said notary in attempting to adjudge that petitioner was in contempt and in issuing a commitment for petitioner and bringing about his arrest and detention violated the provisions of Sections 1 and 16 of Article I of the Ohio Constitution, and the provisions of the Fourteenth Amendment to the Constitution of the United States, and were illegal, null and void.

(9) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article I of the Constitution of the State of Ohio, and are null and void, in that they deprive the petitioner of his liberty and property, contravening that part of Section 1 of Article I, which provides that all men "have certain inalienable rights, among which are those of enjoying and defending liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety."

(10) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 14 of Article I of the Constitution of Ohio, and are null and void, in that they deprive the petitioner of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of Section 14 of Article I, which provides that the "right of the people to be secure in their persons, houses, papers and

possessions against unreasonable searches and seizures shall not be violated."

[fol. 163] (11) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Sections 5, 10 and 16 of Article I and Section 32 of Article II of the Constitution of Ohio, and are null and void.

(12) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of said sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article IV of the Constitution of Ohio in that they attempt to confer judicial power upon notaries public.

(13) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, and are null and void, in that they deprive the petitioner of his liberty and property without due process of law; contravening that part of Section 1 of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

(14) The Court erred in not finding and adjudging that said notary public had no jurisdiction to attempt to take said depositions or to attempt to force or require petitioner to answer any questions or produce any books, papers or documents upon the taking of said depositions or to adjudge petitioner in contempt for failing or refusing so to do, or to make or issue any order of commitment against this petitioner.

(15) The Court erred in not finding and adjudging that said notary public in attempting to adjudge that any questions propounded to petitioner and any books, papers or documents ordered to be produced were material or relevant and in attempting to adjudge petitioner in contempt and issuing a commitment for him, attempted to exercise

judicial powers in violation of Section 1 of Article IV of the Constitution of Ohio and that all of said acts of said notary were null and void.

(16) The Court erred in not finding and adjudging that William Purcell, the notary public purporting to act under said Sections 11510, 11511 and 11512, General Code of Ohio, and attempting to adjudicate that the questions asked of this petitioner which are referred to in the order of commitment issued and made by said notary, and the books, papers and documents which are also therein referred to, are material or relevant to any issue or issues in the case in which it was attempted to take said depositions, and attempting to adjudge the petitioner guilty of contempt and issuing said order of commitment and bringing about [fol. 164] the arrest and detention of this petitioner under said order of commitment, was disqualified on account of his personal pecuniary interest in the taking of said depositions, so to adjudge and act and to commit or cause this petitioner to be committed, by reason of the facts that said notary public was employed and paid by the plaintiff in said alleged pending suit, such alleged judgment and order of commitment being made at the request of said plaintiff, and that his employment was upon such terms that its extent and continuance and his continued compensation were contingent upon procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and by such order of commitment, and that therefore said notary's acts in so adjudging and bringing about the petitioner's conviction and detention were a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States of America and a denial of the rights of redress in courts and of a remedy by due course of law in violation of Section 16 of Article I of the Constitution of the State of Ohio and were null and void.

(17) The Court erred in not finding and adjudging that the attempted adjudication by the notary that any questions propounded to petitioner and any papers, books or documents ordered to be produced by him, are material to any issue in the case in which it was attempted to take said depositions, and the attempted adjudication that petitioner was in contempt, and the issuing of an order or commitment, all in the absence of the petitioner and with-

out notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of petitioner's constitutional rights under Sections 1, 5, 10, 14 and 16 of Article I, and Section 1 of Article IV of the Ohio Constitution and each of said sections, and in violation of his rights under the Fourteenth Amendment of the Constitution of the United States, and were null and void.

(18) The Court erred in not finding that the purported subpœna duces tecum issued by said notary was illegal and void, both on account of its general, vague and indefinite character and because it constituted an unreasonable search and seizure in violation of Section 14 of Article I of the Constitution of Ohio, and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

(19) The Court erred in not finding and adjudging that the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, in which it was attempted to take said depositions, was not entitled to take depositions nor did the notary public have power or jurisdiction to issue any subpœna, require any questions to be answered or books, papers or documents to be produced, for the reason that no service of summons had been made on one of the defendants in said action, viz, Marion M. Miller, nor had any service been made on the defendant Irving Trust Company, in its capacity as Executor of the Estate of Herman Sielcken, deceased.

[fol. 165] (20) The Court erred in not finding and adjudging that the attempt of the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. Woolson Spice Company, et al., defendants, to take depositions in said case was not in good faith for the purpose of securing or perpetuating any evidence material to any issue of said case or for use in the trial of said case or that it was not otherwise in good faith, but was an abuse of process.

(21) The Court erred in other respects apparent on the face of the record.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Petitioner.

[fol. 166] [File endorsement omitted]

IN COURT OF APPEALS OF LUCAS COUNTY

Petitioner's Bill of Exceptions

Filed June 23, 1932.
Notified: Waived.
Delivered to Hon. Harry W. Lloyd, S. S. Richards, Roy H. Williams June 23, '32.
Received from Hon. Harry W. Lloyd, S. S. Richards, Roy H. Williams June 23, '32.

[fol. 167] [Title omitted]

Appearances:

Messrs. Tracy, Chapman & Welles, by Messrs. George D. Welles and Harry S. Bugbee; Messrs. Marshall, Melhorn, Marlar & Martin, by Mr. Stuart S. Wall, for the petitioner.
Messrs. Fraser, Hiett, Wall & Effler, by Mr. Harold W. Fraser; Messrs. Baker, Hostetler, Sidlo & Patterson, by Mr. R. T. Jackson, for the respondent.

Be it remembered that on the trial of the above entitled action and proceedings in the Court of Appeals, Lucas County, Ohio, in the May Term of said Court, A. D. 1932, said trial beginning on the 15th day of June, A. D. 1932, before the Honorables Harry W. Lloyd, Silas S. Richards and Roy H. Williams, Judges of the said Court, the following proceedings were had, viz:

COLLOQUY

Mr. Welles: Mr. Stranahan, one of the petitioners was here and by consent of counsel he has been permitted to go subject to return on call. Before proceeding with this case we would like, if Your Honors please, to have leave to file in each of the three pending cases of Ex Parte Koehrman, Ex Parte Bevan and Ex Parte Stranahan leave to file amendments to the petition for writs of habeas corpus. We have given counsel on the other side copies of the proposed amendment.

Judge Lloyd: They may be filed.

Objection; exception.

Mr. Welles: We should direct the court's attention to the fact that there is, as we are informed, no return or answer from the sheriff at this time. We assume that before we proceed there should be.

Mr. Fraser: If your Honors please, the sheriff is here with the bodies of these men and with his return and I [fol. 168] understand the practice is to hand you the return when he hands you the bodies.

Mr. Welles: I may be in error, but I understand that the return constituted an answer which raised such issues, if any, of fact as the sheriff thought proper to raise and that the question of the propriety of the custody really is dependent upon the return made by the sheriff, showing whether or not he does have legal custody.

Judge Lloyd: Have you the returns here? Let's see them.

Deputy Sheriff Staggemeier: Here they are (handing returns to the court).

Mr. Fraser: The return in each case is accompanied by the original papers under which the sheriff is holding these men, as an exhibition to the court as to why he is holding them.

Judge Lloyd: I suppose we can go on with the hearing now.

Mr. Welles: May we see what the return says?

Judge Lloyd: Each is like the other. Here they are.

Mr. Welles: If your Honors please, in order to save time and get forward with this thing, we would like, with the court's permission, to save our objection to the return on the ground that it does not show any legal cause for the arrest or detention of any of the petitioners and without waiving that point we will proceed with the evidence, first making a statement. These three petitions for writs of habeas corpus arise by reason of writs issued by William Purcell, a notary public, in a case pending in the Court of Common Pleas of this county in which one Clara Sielcken Schwarz is the plaintiff and The Woolson Spice Company, John W. Koehrman, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan, Robert A. Stranahan, Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William A. Brigham, deceased, and The Irving

Trust Company, a foreign trust company, as executor of the estate of Herman Sielcken, deceased, are named as defendants. The petitioner Bevan was served with a subpœna duces tecum, which is attached to his petition and he appeared before the notary and answered certain questions and then, upon the advice of his counsel, declined to answer [fol. 169] certain questions. Counsel for the defendants appeared at that occasion for the sole purpose, as shown by the record, of protesting and objecting to the taking of depositions on various grounds which I will come to in a moment. Petitioners Robert A. Stranahan and Frank D. Stranahan, were served with writs of attachment. I should say the petitioners Robert A. Stranahan and John W. Koehrman were served with writs of attachment, requiring them to appear before the same notary public to give testimony and directing the sheriff to produce them for that purpose there. The petition in the case of Clara Sielcken Schwarz v. The Woolson Spice Company et al., is one in which the plaintiff alleges that she is residuary legatee of Herman Sielcken, deceased, and that The Irving Trust Company, a New York corporation, is the executor, still undischarged and acting under the will of Herman Sielcken, deceased. The petition attempts to charge a conspiracy alleged to have been devised and carried out in the years 1917 and 1918 by the defendants Koehrman, Biggs, Miller, the two Stranahans, and W. A. Brigham, deceased, represented by Mitchell and Eastman as administrators. It is also charged that The Woolson Spice Company was a co-conspirator with the individual defendants. The petition attempts to charge that a sale of stock of The Woolson Spice Company by The Irving Trust Company as executor to the individual defendants, or some of them, was brought about by fraudulent representations or misrepresentations. The plaintiff seeks to have the sale of the stock in the amount of 824 shares of the old stock of The Woolson Spice Company set aside. She requests that the existing stock of The Woolson Spice Company issued in lieu of that should be transferred to her, that the corporation should be required to do so and that she may have an accounting and that she may receive all dividends, disbursements of every kind, which have been made by The Woolson Spice Company to the owners of this stock from the year 1918 down to

the present time. The petition is very lengthy, it contains some twenty-eight pages, but the main point claimed and the main relief asked is as I have stated. The plaintiff seeks to excuse the long delay in the presentation of this claim and in the attempt to enforce it by an allegation to [fol. 170] this effect, it is paragraph 31 of the petition:

"That the said fraud and unlawful acts of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, hereinbefore more particularly set forth were not discovered by the plaintiff until about March, 1931, and, on information and belief, were not discovered by the defendant, Irving Trust Company, until on or about said date."

That is all that there is in the way of explanation or attempted explanation as to why this matter has been permitted to rest since 1918. As I have said, the theory of this petition is that there was a fraud, an actual fraud, committed by the defendants so attempted to be charged. But as your Honors will see when you come to examine the petition in the main case, nearly every allegation attempting to make any charge of wrongdoing I think, all except one, is made upon information and belief. The Irving Trust Company, it is alleged, upon demand having been made upon it to bring this suit as executor, declined to do so and the attempt is therefore made to make it a party defendant as executor. We expect the evidence here will show that the Irving Trust Company as executor is not in this case in any way. The Irving Trust Company itself has been permitted to do business here but the Irving Trust Company as executor of the estate of Herman Sielcken is not in this state or admitted to do business here. A demurrer has been filed in the Court of Common Pleas to this petition by one of the defendants, namely Franklin H. Biggs, the grounds of the demurrer are: first, that the plaintiff has not legal capacity to sue, and second, that the petition does not state facts which show a cause of action.

Judge Lloyd: When was that filed, how long ago was that?

Mr. Welles: It was filed on June 11, 1932.

Judge Lloyd: I was wondering why it had not been heard.

Mr. Welles: I may say if it is important, the evidence

here will be to the effect that we offered to have it heard immediately, prior to the going forward of these depositions or the attempt to go forward with them, and that counsel representing the plaintiff said they preferred to [fol. 171] have that demurrer heard in the usual and ordinary course. We filed a brief with the court with the number of points raised in the demurrer, and filed a copy of that with counsel for plaintiff. Then, third, that there is a misjoinder of parties defendant; fourth, that there is a defect of parties plaintiff; four-a, that there is a defect of parties defendant; fifth, that separate causes of action against several defendants are improperly joined; sixth, that the action was not brought within the time limit for the commencement of such an action, and seventh, that several causes of action are improperly joined. I may say we have been and are now ready to submit that demurrer to the Court of Common Pleas at any time, and have so advised counsel for plaintiff in the court below.

Judge Lloyd: Did counsel request oral argument? Unless the rule is changed, as soon as the demurrer is filed and briefs with it, the court goes ahead and decides it on its own initiative.

Mr. Welles: There has been no brief filed on behalf of plaintiff and their time has not expired, but in the meantime, as the evidence will show, an attempt was made to go forward with these depositions. Now, in addition to the fact that, if we are correct in our position on the demurrer, the plaintiff has no legal capacity to sue and that there is no cause of action stated and that therefore there can be no material or relevant evidence of any sort obtained from any witness, therefore no witness can be required to answer any question. It further appears that, or will appear, that the notary public issued for the petitioner Bevan, who is the secretary and treasurer of The Woolson Spice Company, a subpoena duces tecum of a character which, under the authorities as we understand, constitutes an unreasonable search and seizure and which does not comply with the rule that requires reasonable description and specification of papers which it is sought to have produced by such subpoena. An example of the requirements of the subpoena is "all contracts and copies of contracts at any time entered into by you", this is in the Koehrman sub-

[fol. 172] poena, "at any time entered into by you for the purchase or sale of any corporate stock of The Woolson Spice Company"; and skipping through, for instance, No. 5 "All correspondence and copies of correspondence had by you with The Columbia Trust Company, New York, and/or its successors and/or any of its officers, agents, and directors, including George E. Warren and Willard V. King from 1916 to 1932 inclusive". Regardless of the subject matter of the correspondence it is all required to be produced. And another one, No. 8, "Any and all correspondence and copies of correspondence with William A. Brigham, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan, Robert A. Stranahan, Thorlief Nielsen, John S. Sorenson, The Woolson Spice Company and S. P. Jermain, from 1916 to 1932 inclusive," regardless of the subject matter of such correspondence, so that it seemed to us and we so advised Messrs. Koehrman and Bevan, Mr. Bevan's subpoena duces tecum was of a similar character, that under the law and the Constitution that they were not required to undertake to move their files bodily up to the law office of Messrs. Fraser, Hiett & Effler, and that the subpoena so far as it attempted to require the production of the papers was, in our opinion, void and until this court or some other court would otherwise rule they need not obey it. Now, as I say, the evidence will show that we appeared specially at the taking of the depositions of Mr. Bevan and saved all of our objections to the procedure, but he nevertheless did answer some questions. Certain questions he was advised he need not answer on the grounds which I have stated here, that the petition does not state a cause of action and plaintiff had no legal capacity to sue and the other grounds stated in the demurrer, that the subpoena duces tecum was illegal and void, and, accepting that advice, he declined to answer certain questions which, even if the petition did state a cause of action, I think under the rule laid down by this court in Poe v. Mathias, would be found to be wholly immaterial, and thereupon this order of commitment was issued. We think the evidence will show that the notary issued this order of commitment in the absence of the witness Bevan, in the absence of his counsel, without notice [fol. 173] to counsel or to Bevan, without opportunity to Bevan to be heard on the question as to whether he had committed a contempt or whether he was justified in re-

fusing to answer the questions and produce the books and the notary purported to adjudge, using that word, that Bevan was in contempt and purported to adjudge that the questions asked him were material, as shown by the commitment papers signed by the notary himself. It will, as your Honors have seen at this time be our contention that there has been a violation of the constitutional rights of these plaintiffs both under the state statutes, numerous sections of which we will point out in our argument, under the fourteenth section of the Constitution of the United States, an attempt on the part of the notary to exercise judicial power, and the evidence will show that the notary has necessarily a pecuniary interest in attempting to force these witnesses to testify before him, since he is acting not only as notary but as stenographer and will get certain fees and compensation for writing the transcripts, and therefore he is disqualified from undertaking to decide whether this man should be put in jail, under a decision of the United States Supreme Court in the Toomey case and other similar cases. Mr. Wall has reminded me that the evidence will also show that there has been no service of summons upon Marion M. Miller, one of the defendants, and that the attempted service of summons upon the Irving Trust Company as executor is void and ineffective as service against it as executor; that there has been no service of notice of the taking of these depositions upon the defendant Marion M. Miller and no real legal service of notice of the taking upon the Irving Trust Company as executor, and that, therefore, the case has not been placed in the posture required by the statutes for the taking of depositions, even though there were nothing else involved. I perhaps did indicate, but to make it clear, the opening statement is intended to apply to all three of the pending habeas corpus proceedings, Bevan, Stranahan and Koehrman, except in so far——

Judge Lloyd: I take it the questions involved are practically the same?

[fol. 174] Mr. Welles: Practically the same. There are one or two questions in the Bevan case arising by reason of the fact that some questions were asked him that do not arise in the Stranahan or Koehrman cases, otherwise the question is the same.

Mr. Fraser: Upon the last questions, if the court please, your Honors may want to consider this question, whether or not a witness who defies an order of a notary to appear and refuses to appear, and in answer to a subpœna appeared and refused to testify, anyway, whether that witness is in a position to raise these questions which Mr. Welles suggests. The only witness appearing was Mr. Bevan. Your Honors have observed from the statement of counsel this is a case involving a charge of an unlawful conspiracy entered into, secretly of course, by the defendants for the purpose of defrauding this estate. The petition is long in an attempt to set up the facts and after the statement of legal questions the facts are there and properly there under the authorities, we believe. We believe this plaintiff has a complete right and complete legal capacity to file and maintain this suit. How far your Honors will feel justified, in view of the decisions of this court, in examining into the technical sufficiency of this petition which is pending in the Court of Common Pleas and in which your Honors have no original jurisdiction to examine, will be discussed later as I have suggested. So far as the facts are concerned, on the sixth day of June a proper legal notice was served of the taking of depositions upon the thirteenth, was served upon counsel for these defendants who are now trying or appearing and who acknowledged service of that notice, and who appeared on the thirteenth with a witness Bevan. They were served with summons originally in the case on the second of June. Because of the fact that certain allegations in this petition for habeas corpus, the court should be advised that upon the original notice served and original subpœnas the defendants, in order to frustrate us in the taking of depositions, applied to the Common Pleas Court for an injunction, their main contention being, as I understand, they wanted time to prepare the case, on the sixth of June. On the sixth [fol. 175] of June an agreement was made, a verbal agreement, that the depositions would be taken on the thirteenth. Thereupon new notices were served on Monday, the sixth, acknowledged and on the seventh, after service of those notices the subpœnas were served on the defndants.

Judge Lloyd: Is this suit an action for damages or a suit in equity?

Mr. Fraser: Suit in equity, I rather think it is. It is a suit with alternative relief prayed for.

Judge Lloyd: If it is a suit in equity you could have a bill of discovery.

Mr. Fraser: That is doubtful under the Fairchild case. That case deals with the other question we have here, matter of materiality and matter of properly questioning—at any rate we have a legal right under the law, statutory right to take these depositions, and we think these gentlemen have no power to nullify that right. We think the court will be satisfied that these questions put to Mr. Bevan were material on the issues as presented in the petition. The subpœna duces tecum, to illustrate, we tried through Mr. Bevan, secretary and treasurer of the company, to produce the minute book. If that is not a correct description of the book, I don't know what is. He went on the stand and testified that he did have it but had turned it over to his counsel. Where it was now he didn't know. When he was on the stand we discovered that. Whether we will ever get the book, we don't know. We asked for the record of stock transfers, which are most material to this situation, this whole deal, as all these deals are, was concocted and carried out in the dark, with the lights all out, as these gentlemen always work, and work in secret, we wanted to find out what the minutes of this company showed, so I asked, we asked for the production of the minute book and it appears in the testimony of Bevan that there is one, but where it is we do not know, it was in his possession until the filing of this suit and he says it was [fol. 176] turned over to his counsel. We asked for the production of the record of the payment of dividends since this time when we say this stock was fraudulenty acquired and transferred. We asked for the record of the company showing the transfers of stock. It is obvious that this deal or transfer had been indirect and through many hands. That is the way those things are usually done, and we are entitled to know how. This man has testified that there are such records. In the subpœna duces tecum we only have to describe the document so the witness may know what is wanted and what is meant. If there is anything in the subpœna he doesn't know and can't ascertain the identity of, that can be taken care of when it is reached. In this examination of Mr. Bevan we tried to have him produce these

things designated, which are perfectly plain. No one can doubt their identity. He refused to produce them under the advice of counsel. We believe, if the court please, under the authorities this is the rule which your Honors will apply, that if there is any reasonable probability or possibility, as some of the courts say, these matters being material in this case, the court will not deny us the right to ascertain those facts, even though it does involve the cross examination of a defendant. The statute was passed for that purpose and as the Supreme Court has said in many cases, particularly in the Fairchild case, we can not be required to wait until they are satisfied the time has arrived for our finding out these facts. It is a valuable right given by the statute and we insist now it is two weeks after the filing of the petition. They have secured that much delay and we are entitled to proceed in the examination of these people and ascertain the facts and ascertain other evidence. Now, there is an allegation here for example, made in the supplement, that Mr. Purcell is not disinterested. No answer, I think is filed, and I understand it is not necessary to file an answer. That allegation of course we challenge. They make a challenge that our effort wasn't in good faith, to take testimony. That allegation is challenged, and proof will be offered. But if your Honors' practice is to exclude evidence challenging and disproving allegations of that kind, somebody must have the right to file an answer. The suit as filed here is not plaintiff and defendant, as may be done, it is filed ex parte John Smith, ex parte Koehrman, and the sheriff produces the body and the return and shows why he is holding these men. [fol. 177] Whether the sheriff has any right—he denies this charge of bad faith, he denies the officer was not authorized.

Mr. Welles: It is agreed in the Stranahan case that Mr. Robert A. Stranahan, the petitioner, would, if called as a witness, testify that he is in good health and that he expects to be present at the trial of this case if and when the case is tried on the merits.

Mr. Fraser: We make that stipulation notwithstanding the fact that on Monday Mr. Welles said Mr. Stranahan was ill and not feeling well.

Mr. Welles: As far as I know, that is the only thing we have been able to agree upon since this trial started.

Mr. Fraser: We can agree upon this, if the court please, that no service of summons has been made on Marion Miller. He is in California, and service here was residence service only and whether it was made, I don't know.

Judge Richards: Is he a necessary party?

Mr. Fraser: No.

Judge Richards: Is the Irving Trust Company?

A. No, I think not. But they have been served. Not only that, but have entered their appearance by acknowledgment of the deposition notice.

Mr. Wall: The sheriff's return on Miller shows "not found".

Mr. Fraser: Very well.

Mr. Welles: I understand you agree there has been no service on Marion Miller, either by summons or notice to take depositions?

Mr. Fraser: Yes, sir. And depositions when taken, we concede can not be used against the man who didn't have notice, but may be used against those served. These stipulations are made reserving our objections and exceptions to their materiality.

OFFERS IN EVIDENCE

Mr. Welles: Any offer of evidence as made by us is subject to our objection that there is not sufficient showing by answer or return from the sheriff showing legal custody of any of the petitioners. We do offer in evidence the petition in the case of Clara Sielcken Schwarz v. The Woolson Spice Company, and in order to avoid encumbering the [fol. 178] record further, if it is satisfactory, the copy attached to the amendments to the habeas corpus proceedings may be considered in evidence.

Mr. Fraser: It is also attached to the return of the sheriff. We do not object on the ground of identification

Judge Lloyd: You may have your exceptions.

Mr. Welles: Without objection as to lack of certification?

Mr. Fraser: Yes.

Mr. Welles: We offer copy of the demurrer filed by defendant Franklin H. Biggs in the case of Schwarz v. Woolson Spice Co.

Mr. Fraser: Note an objection on the ground of materiality.

Mr. Welles: And marked Plaintiff's Exhibit No. 2, the petition should be marked Exhibit No. 1. In the Bevan case we offer in evidence the copy of the commitment which is attached to the petition, and which may be marked Exhibit No. 3A. We also offer the copies of the writs of attachment which are respectively attached to the petitions in the Stranahan case and in the Koehrman case, and which are marked Exhibit- 3B and 3C respectively.

Mr. Fraser: The originals of those are likewise attached as a part of the sheriff's return of the writ of habeas corpus. Are those marked?

Mr. Welles: Those should be numbered in their own cases. We offer in evidence in each of the three cases Exhibit No. 3, which is a copy of the authority of the Irving Trust Company of New York to do business in the State of Ohio. If it is agreeable to counsel we will use a certified copy of it in one case and copies of that in the others.

Mr. Fraser: We are objecting to Exhibit No. 3 on the ground that The Irving Trust Company has already entered its appearance here.

(Overruled; exception.)

Mr. Welles: We also offer in evidence in each of the three cases Exhibit No. 4, which is a certified copy of the instrument filed by The Irving Trust Company with the secretary of state showing its authorized powers and the location of its office in this state and the name of its local representative, etc. We shall offer a certified copy in one case and copies of that in the others, if there is no objection.

[fol. 179] Mr. Fraser: Note our objection and exception.

Mr. Welles: We now offer in evidence in the Bevan case the subpœna duces tecum which was served on Mr. Bevan, marked "Plaintiff's Exhibit No. 7", in the Koehrman case the subpœna marked "Plaintiff's Exhibit No. 8", and in the Stranahan case the subpœna which was served on Mr. Stranahan, marked "Plaintiff's Exhibit No. 9", copies of each being attached to the original petitions for habeas corpus.

Mr. Fraser: Referring to the subpœnas served on the seventh of June?

Mr. Welles: Yes, the ones attached to the petition. No objection to the use of copies, is there?

Mr. Fraser: Not at all.

Mr. Welles: I would like to call Mr. Purcell the notary public.

Thereupon WILLIAM PURCELL, being first duly sworn, testified as follows:

Direct examination.

By Mr. Welles:

Q. Your name is William Purcell?

A. Yes, sir.

Q. Live in Lucas county, Ohio?

A. Yes, sir.

Q. Notary Public of that county?

A. Yes, sir.

Q. You are the William Purcell who issued the writ of commitment for C. N. Bevan and writs of attachment for Robert Stranahan and Koehrman?

A. I am.

Q. In the case of Schwarz v. Woolson Spice Company?

A. Yes, sir.

Q. Were you employed by somebody to act as notary and take or attempt to take depositions?

A. Yes, sir.

Q. Who employed you?

A. The firm of Fraser, Hiett, Wall and Effler directly.

Q. The same firm who are of counsel for Clara Sielcken Schwarz in the case mentioned?

A. Yes, sir.

[fol. 180] Q. Is it a fact that you originally signed subpœnas for Mr. John W. Koehrman and Mr. C. N. Bevan and Mr. Stranahan, directing them to appear before you to give testimony and produce books and papers, at a time when no petition in the case of Clara Schwarz v. Spice Company had been filed?

(Objection.)

Mr. Fraser: The notice which they acknowledged was upon the sixth of June, there was an earlier notice served

on the day the case was filed, which was questioned before Judge Gosline on the sixth of June and at that time new notices were drawn and served.

Mr. Welles: I thought in view of some of the things Mr. Fraser had said about the history in the Court of Common Pleas——

Judge Lloyd: I don't think we are getting on——

Mr. Welles: Very well. Did you receive from anybody any acknowledgment or proof of service of notice of the taking of depositions before you set for June 13, 1932, in the cause of Schwarz v. Woolson Spice Company?

A. Yes sir.

Q. Do you have that with you?

A. No, sir.

Q. Do you have it there, Mr. Fraser?

Mr. Fraser: Yes.

Mr. Welles: May I see it. Now, Mr. Purcell, I show you a paper marked Plaintiff's Exhibit No. 6, is that the acknowledgment of service of notice of the taking of depositions just referred to by you?

A. Yes, sir.

Q. Have you any other acknowledgment of service of notice than that, referring to the June 13th proceedings?

A. No, sir.

Q. You have no return of service of notice of the taking of these depositions upon Irving Trust Company, executor?

A. None other except just this.

Q. Or upon Marion M. Miller?

A. No, sir.

Q. Neither one?

A. No sir.

Q. Have you any acknowledgment or proof of return or service of this notice or any notice upon Mitchell and Eastman?

(No answer.)

[fol. 181] Q. Mr. Purcell, I show you a copy of the subpœna duces tecum which is attached to the original petition for writ of habeas corpus filed by C. N. Bevan, is that a copy of the subpœna duces tecum issued by you for Mr. Bevan?

A. I can't tell, Mr. Welles.

Q. Have you produced the original Bevan subpœna signed by you?

A. It wasn't given to me, sir. It was introduced in evidence. It was referred to but not marked as an exhibit at the taking of the deposition.

Q. Was it left in your possession?

A. No, sir.

Q. I show you paper marked Exhibit No. 7, is that the original subpœna signed by you for Mr. Bevan?

A. Yes, sir.

Q. Dated the seventh of June?

A. Yes, sir.

Q. Did you prepare that subpœna, or did counsel for plaintiff prepare it?

A. Counsel prepared it.

Q. Counsel prepared it for you?

A. Yes, sir.

Q. I show you the commitment addressed to Joseph Zimmerman, sheriff, directing him to arrest and commit C. N. Bevan to the jail of Lucas county, being a paper which is attached to the sheriff's return in the Bevan case, did you sign that commitment?

A. Yes, sir.

Q. Did you give Mr. Bevan any notice before you signed it that you were going to sign it?

(Objection; overruled; exception.)

A. No, sir.

Q. Did you give counsel for Mr. Bevan any notice that you were to sign a commitment for Mr. Bevan?

(Objection; overruled; exception.)

A. Yes, sir.

Q. Isn't what you said this: that if a commitment was presented to you, you would sign it?

A. No, Mr. Welles, I believe I said that I was going to sign one but I didn't think I would get it into the hands of the sheriff before morning.

Q. You gave counsel for plaintiff no notice of the time and place when you were to sign the commitment?

A. Counsel for plaintiff?

[fol. 182] Q. Counsel for Bevan?

A. Not of the exact time.

Q. Nor of the place? Now, in your commitment appears the following:

"As appears in the foregoing transcript of said proceedings, the said Bevan then and there refused to answer as hereinbefore set forth, and for the reasons therein stated, and the undersigned, a notary public, in each instance ordered the said witness to answer which he refused to do; and the undersigned, a notary public, then and there for the said contempt of the said C. N. Bevan, in refusing to answer each question, and refusing to produce said books, papers and documents, ordered and adjudged that he be imprisoned in the county jail until he submit to testify in the premises."

Now, isn't it a fact, Mr. Purcell, that at the time Mr. Bevan was present at the taking of his deposition, at the time he refused to answer questions, that you then and there adjudged that he was in contempt and ordered that he be committed?

(Objection; overruled.)

A. No, sir, I didn't at the exact moment.

Q. It was some hours later that you signed this commitment, wasn't it?

A. It was immediately at the conclusion of the taking of the depositions that commitments were decided upon and gotten up.

Q. It was some hours after Mr. Bevan had left the office before you signed this commitment?

A. Yes, sir.

Q. And you had no hearing, heard no arguments, received no evidence on the question as to whether Mr. Bevan was in contempt or whether he had any justification or reasonable ground for refusing to answer?

(Objection; overruled; exception.)

A. No, sir.

Q. You served upon Mr. Bevan no notice, either verbal or in writing, of any charge which you were making against him, before you signed this order for his commitment?

(Objection; overruled; exception.)

A. No, sir.

[fol. 183] Mr. Fraser: May I have objections and *objections*, without interrupting?

Judge Lloyd: Yes, you may.

Mr. Welles: Your commitment further reads:

"The undersigned, a notary public, adjudges that said questions and said books, papers and documents therein referred to are material to the issues in said cause as appears from the petition filed herein, copy of which is hereto attached and marked Exhibit A."

Did you in fact hold any hearing, hear any arguments, give counsel for Mr. Bevan or for the defendants in the Woolson case any opportunity to be heard by you on the question as to whether these documents or questions were material to the issues?

A. No, sir.

Q. Did you in fact even read the petition in the Woolson Spice case?

A. Yes, sir.

Q. Are you a lawyer?

A. No, sir.

Q. Did you undertake to form a deliberate judgment upon the legal question as to whether the questions asked were material to the issues raised by the petition in the Woolson case?

A. No, sir.

Q. You simply signed the paper presented to you by counsel for the plaintiff in that case, is that right?

A. Yes, sir.

Q. I show you paper marked Plaintiff's Exhibit No. 8, is that the original subpœna signed by you under date of June 7th for John W. Koehrman?

A. Yes, sir.

Q. It is a fact that because Mr. Koehrman did not appear before you on June 7th that you then signed and delivered to the sheriff a writ of attachment, the original of which appears as a part of the sheriff's return?

(Objection; overruled; exception.)

A. No, sir.

Q. At whose request did you sign the writ of attachment for Mr. Koehrman, which is a part of the sheriff's return.

A. At the request of Mr. Fraser.

Q. What was the reason for signing it?

A. Because he didn't appear on the thirteenth day of June.

[fol. 184] Q. Is it a fact, Mr. Purcell, that on the morning of June 13, 1932, after you had undertaken to begin these depositions, that I stated before you, as shown by your transcript, without waiving any rights or submitting themselves to the jurisdiction of the notary, Mr. Koehrman will come over here and meet with you gentlemen whenever you are through with Mr. Bevan, who is now here?

A. Yes, sir.

Q. And was there, to your knowledge, any request thereafter made that Mr. Koehrman should come over that afternoon?

A. There was a request made that I issue an order of attachment immediately for Mr. Koehrman.

Q. You issued the order of attachment immediately upon that statement being made?

A. At the conclusion of the depositions.

Q. You didn't issue it right that morning, then?

A. Yes, sir.

Q. You didn't issue it right that morning then?

A. Yes, sir. As soon as we took the recess until afternoon.

Q. You issued the attachment for Mr.——

A. I am sure the attachment was in the hands of the sheriff before eleven thirty a. m.

Q. As far as you know, no further request was made that Mr. Koehrman should come there, except as you undertook to enforce his attendance by this writ of attachment?

A. Yes, sir.

Q. Is this Exhibit No. 9 the subpœna which you issued for Robert A. Stranahan?

A. It is one of the subpœnas.

Q. That is the one dated June 7th?

A. Yes, sir.

Q. Is the writ of attachment which is attached to the sheriff's return and marked Plaintiff's Exhibit No. 10 in

the Stranahan case here, is it the one which you issued for the arrest of Mr. Stranahan?

A. Yes, sir.

Q. We offer in evidence each and all of the exhibits which have been called to the attention of Mr. Purcell, making an offer of each one separately.

(Objection; exception.)

Q. You were employed not only as a notary public but [fol. 185] also as a stenographer in the taking of these depositions of these three men whose petitions for habeas corpus are here, were you not?

A. Yes, sir.

Q. And you were acting as both notary and stenographer?

A. Yes, sir.

Q. Is it a fact that the amount of your compensation as a stenographer taking these depositions is dependent upon the number of pages of your notes which you transcribe and deliver to counsel for plaintiff?

A. Dependent upon the number of pages which we transcribe and deliver to all counsel.

Q. To any counsel, including counsel for the plaintiff?

A. Yes, sir.

Q. Do you receive any per diem as notary from counsel?

A. No, sir.

Q. Have no arrangement of that sort?

A. No, sir.

Q. Your compensation is contingent on the extent to which they testify before you?

A. Yes, sir.

Q. And the extent to which you transcribe the testimony, including the exhibits?

A. Yes, sir.

Q. And your employment as stenographer was by Messrs. Fraser, Hiett, Wall & Effler?

A. Yes, sir.

Q. In the taking of these depositions, I mean?

A. Yes, sir.

Q. What is your rate of compensation per page of typewritten transcripts of depositions or exhibits?

A. Based on the number of words. Twenty-five cents a hundred words, based on the statute.

Q. For the original copy?
A. Yes, sir.
Q. And you make a charge for furnishing carbons?
A. Yes, sir.
Q. What rate?
A. The party ordering the original pays for their carbon copy ten cents a folio and opposing counsel pays fifteen cents.
Q. Were you in fact directed by Mr. Fraser or one of his firm to prepare an original typewritten transcript of these depositions?
A. I was directed to transcribe the testimony.
[fol. 186] Q. In typewriting?
A. Yes, sir.
Q. And to deliver how many copies to his office?
A. Deliver one carbon to his office and one carbon to Mr. Jackson.
Q. What were you to do with the original?
A. The original I took it for granted is to be kept in my office until signed and filed.

Cross-examination.

By Mr. Fraser:

Q. Mr. Purcell, before this morning, at any time in the proceedings, was any objection made by counsel for these defendants to your competency or qualifications?
A. Not to me.
Q. In your hearing?
A. Not that I know of.
Q. At the time of the taking of the testimony was anything said by Mr. Welles or any of counsel for defendants in any way questioning your qualifications or fairness or ability?
A. No, sir.
Q. In addition to employment by us to transcribe this testimony, were you also employed by counsel for the defendants to furnish them certain copies?
A. Yes, sir.
Q. Has that been done?
A. Yes, sir.
Q. Except to be paid by them for these copies?
A. Yes, sir.

Q. Practice in the taking of depositions is this, is it not, a deposition is taken and certain fees are taxed for the taking of the original?

A. Yes, sir.

Q. And returned and taxed as costs in the case and in many instances the counsel calling you advance those costs to you?

A. Yes, sir.

Q. Has that been the universal practice?

A. Yes, sir.

Q. How long have you been engaged in this work.

A. Sixteen years.

Q. Before issuing any of these writs of arrest or commitment, did you or did you not consult one of the judges of the Common Pleas Court of this county?

A. Yes, sir.

[fol. 187] Q. Which judge?

A. Judge Gosline.

Q. Were the writs issued after consultation with him?

A. Yes, sir.

Q. At the time that you were shown and had knowledge, personal knowledge of the original deposition notice served upon and acknowledged by Tracy, Chapman & Welles, were you told by me that service was also being made upon the Irving Trust Company's agent in Toledo?

A. Yes, sir.

Q. Were you also told that the original notice would be in the mail the next day?

A. I don't recall that.

Q. You never have seen that original notice?

A. No, sir.

Q. Acknowledged by them?

[fol. 188] Redirect examination.

By Mr. Welles:

Q. You don't mean that you filed any formal application with the Court of Common Pleas for instructions or advice as to whether you should issue these writs of attachment or commitment?

A. No, sir.

Q. You didn't give counsel for defendant an opportunity to be heard and present any views they had as to why attachment or commitment should not issue?

A. No, sir.

Q. You simply went over and told Judge Gosline in substance that Mr. Fraser had asked you to issue writs of attachment or commitment or both and that because there was an application for injunction pending before him you wanted to find out whether it was all right to issue such writ?

A. In substance, that is it.

Q. He said, in substance, that the mere pendency of the application did not amount to one and you were at liberty to perform whatever your duties were in the premises?

A. Yes, sir.

Judge Williams: Was an attachment issued for the two witnesses who did not appear?

A. Yes, your Honor.

Q. And arrested under the writ of attachment?

A. Yes, your Honor.

Witness dismissed.

Mr. Welles: May it be conceded that Mr. Bevan, if called as a witness, would testify that he is in good health and expects to be present at the trial of the case of Clara Sielcken Schwarz v. The Woolson Spice Company in the Court of Common Pleas if and when it is tried, and resides in this county.

Mr. Fraser: Yes, I think he will testify to the same subject matter in his deposition, of course with our reservation of objection.

Mr. Welles: And the same thing as to Mr. Koehrman?

Mr. Fraser: Yes, with the same reservation.

Mr. Welles: We offer in evidence the several stipulations with respect to what the petitioners would testify to on these subjects.

[fol. 189] **Mr. Fraser: Mr. Welles, will you stipulate that the young man who served this notice would testify that it was served upon Mr. Dexter, the man who appears to be the authorized agent of the Irving Trust Company?**

Mr. Welles: You say you have a letter saying this was handed to Mr. Dexter?

Mr. Fraser: I have statement over the telephone that this was served upon Mr. Dexter and he signed it, placed his signature on there acknowledging service.

Mr. Welles: I think we ought to have him here.

Mr. Fraser: I will make my professional statement that as soon as we can we will call him, bring evidence to show that. Mr. Welles, you don't question the signature of your firm appearing upon the original notice?

Mr. Welles: No.

Mr. Fraser: Exhibit No. 6.

Mr. Welles: No:

Thereupon Raymond T. Jackson, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fraser:

Q. Your name, please?

A. Raymond T. Jackson.

Q. You are a lawyer, Mr. Jackson?

A. Yes, sir.

Q. Member of what firm?

A. Member of the firm of Baker, Hostetler, Sidlo & Patterson of Cleveland.

Q. Their offices in the Union Trust Building?

A. Yes, 1956 Union Trust Building, Cleveland, Ohio.

Q. Have you been active in the preparation and filing of this law suit?

A. I have.

Q. And did you take part in the preparation of the various notices and subpœnas for depositions in this case? [fol. 190] A. Well, I was in contact with the preparation and was asked to see that the notices be prepared. As far as our firm was concerned the work was physically done by Mr. Morley in cooperation with your office.

Q. Are you in a position to testify whether or not these depositions are being taken in good faith or in bad faith?

(Objection; overruled; exception.)

A. I am.

Q. What is the fact?

(Objection; overruled; exception.)

A. The depositions are being taken in good faith.

Q. What is the fact as to whether or not they will or will not be used in the trial of this Schwarz case?

(Objection; overruled; exceptions.)

A. Depositions are being taken with the intention that they shall be transcribed and filed in the Common Pleas Court of this county and that the depositions will be used by the plaintiff if any occasion under the statute should arise which will permit their use and if the witnesses, particularly those called for cross examination under the statute, testify to the truth.

Cross-examination.

By Mr. Welles:

Q. Mr. Jackson, it is a fact, is it not that the proposition has been made to you several times by counsel for certain of the defendants, including the three petitioners here, that you should agree that the demurrer in the Court of Common pleas should be first heard before a deposition should be taken, so that we might know whether there is any right on anybody's part to take anybody's deposition?

A. I don't know whether any proposition of that kind ex- [fol. 191] actly was made. I can state the facts as I understand them, if you want me to do it.

Q. I would like to have you state whether, in substance, the suggestion was not made that we should hear the demurrer before taking the depositions?

A. I will say this, that counsel for the defendants sought an agreement to postpone the taking of the depositions until——

Mr. Welles: I object to his rambling around here and go into an irrelevant controversy in which he can make this speech he is trying to make.

A. A suggestion was made.

Q. You say it was made, a suggestion was made by me to you?

A. Yes.

Q. And declined by you?

A. That is right.

Q. And is it not a fact that we stated to you that we were willing to submit that demurrer immediately, at any time suiting the court's convenience and your convenience?

A. You so stated yesterday to me, Mr. Welles.

Q. Didn't we say, so state, at the time we were before Judge Gosline that we were intending to file a demurrer which we would submit?

A. You stated you intended to file a demurrer before Judge Gosline on June 6th and that you would be glad to expedite the hearing of the motion when and if it should be filed.

Q. It is a fact, is it not Mr. Jackson, that you first attempted to take these depositions by means of serving with the summons a notice to take depositions?

A. Well, they were served the same day. My understanding is that the summons were served first, I wasn't there.

Q. But they were entrusted to the sheriff to be served at or about the same time?

A. My understanding is that after the summons had been issued in the suit and delivered to the sheriff of this county, he was then given notice of taking depositions and certain subpœnas and directed to serve them in a certain way, first [fol. 192] the summons and then the notices and then the subpœnas. I wasn't here but that is my understanding.

Q. They were to be served upon the defendants direct, not upon counsel?

A. That is right, no counsel had appeared for them Mr. Welles.

Q. And they were served with or at approximately the same time, the subpœna duces tecum, on the witnesses Bevan and Koehrman?

(Objection.)

Q. In order to shorten the thing, may it be admitted that the first attempt to take depositions in this case by plaintiff consisted of causing to be served upon certain of the defendants on the same day the summons was served upon

those defendants, a notice to take depositions, service being made upon the second of June and notice to take depositions for the sixth of June, and that upon Bevan and Koehrman there were served by the sheriff at or about the same time, at least on the same day, subpœnas duces tecum for the production of books and papers before the notary on June 6th.

Mr. Fraser: If that stipulation includes the service on the Irving Trust Company in substantially the same way, yes. I understand the order was first, service of summons upon the resident defendants, then notices to take depositions and in the instance of Mr. Bevan, who is not a defendant, he was served with a subpœna duces tecum after the summons on the defendants had been served and notices to take depositions. In Koehrman's, he was served first with summons, then with notice to take depositions, then with a subpœna duces tecum. This stipulation is made with the reservation.

Mr. Welles: There is no stipulation, then, because Mr. Fraser's additional language is quite contrary with what has been found in the Court of Common Pleas, and we can not agree with it. We will be glad to have the sheriff called and present the exact facts, but we do not think it is material.

[fol. 193] Judge Lloyd: And we agree with you.

Mr. Fraser: Mr. Jackson, referring to the cross examination with respect to any agreement made on June 6th with respect to hearing or taking depositions and filing and hearing of the demurrer, tell the court the substance of that talk?

(Objection; overruled; exception.)

A. On June 6th at the hearing before Judge Gosline it was suggested that the hearing of that pending motion be continued, and asked counsel if they could not agree on some method of going forward and in talking with Mr. Welles after the suggestion from Judge Gosline, I stated that we would be willing to postpone the consideration of the pending matter and go forward on the following Monday, June 13th, taking the depositions at Mr. Fraser's office that date having been suggested in conference by Judge Gosline. Mr. Welles asked for some time to confer

with someone and then told me that that date would be acceptable and that no objection would be made that any demurrer was pending if the one should be filed, or any exceptions taken to the taking of the depositions, and with that conversation we said we would issue the new subpœnas and notices which are the ones involved in this proceeding.

Motion to strike out answer as irrelevant, overruled, exception.

[fol. 194] Thereupon GEORGE D. WELLES testified as follows:

Mr. Wall: Will you state the substance of the conversation between you and Mr. Jackson on June 6th, regarding the time of taking the depositions?

A. Judge Gosline suggested a recess, and then invited us into his room and suggested we agree upon some date for taking these depositions. He finally said it ought to go about a week, he thought. I told him and Mr. Jackson was present, that we would consider it and let him and Mr. Jackson know. We did consider and consult and my arrangement with Mr. Jackson was this. I said to Mr. Jackson, in substance, that obviously we must preserve any rights we had to object to these depositions, but whether there was a delay or whether there was not a delay, we would waive no rights, we were going to rely upon every right we had and expected to file a demurrer, and that we expected to rely upon the fact that there was a demurrer pending. Mr. Jackson said to me, in substance, "does that mean you will object to the witnesses testifying at all, that you won't let them testify at all on the ground you have a demurrer pending?" and I said we wouldn't waive that objection; but these two witnesses, Koehrman and Bevan will appear and will submit to answering some questions, what questions or how many I wouldn't now say, but we shall reserve all rights. I afterwards went back to Mr. Jackson, before we went, a moment or two afterwards, and said to him I didn't want any misunderstanding about this, "I want you to understand we will waive no objection that we have."

Mr. Fraser: My statement as to what occurred there is in the depositions and on file. I don't think it is at all material.

Mr. Welles: If Mr. Fraser's statement is considered, I want Mr. Wall's statement considered also, if it is to be material.

Thereupon the court recessed for the noon hour, to reconvene at 1:30 o'clock p. m.

Mr. Welles: With the court's permission we would like to [fol. 195] reopen our evidence for the purpose only of offering one New York Court of Appeals decision and a section of the New York statutes which we think bear upon the subject.

Judge Lloyd: Very well, you may put it in.

Mr. Fraser: Subject to our objection.

Mr. Welles: Your objection isn't because we are not proving the New York statute by some New York attorney?

Mr. Fraser: No.

Mr. Welles: We offer in evidence the opinion of the Court of Appeals of New York in the case of Harrington, Admr., etc., respondent, v. Eugene M. Keteltas et al., appellants, 92 New York, beginning at page 40 and ending on page 50, called Exhibit No. 11, and we also offer from the New York Civil Practice, Cahill, 1927, the following subsection 5 of Section 20 of the Surrogate's Court Act.

Mr. Fraser: Objection and exception.

Mr. Welles: You aren't objecting to the manner of proof?

Mr. Fraser: No.

Mr. Welles: "The Surrogate in or out of court as the case may be has power: 5. To require by order an executor, administrator, testamentary trustee or guardian, subject to the jurisdiction of his court, to perform any duty imposed upon him by statute or by the surrogate's court under authority of the statutes."

Thereupon Raymond Adamski, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fraser?

Q. What is your name, please?
A. Raymond Adamski.

Q. Where do you live?

A. 2601 Tate Avenue, Cleveland, Ohio.

Q. Are you employed somewhere?

A. Yes, sir.

Q. Where?

A. Law firm of Baker, Hostetler, Sidlo & Patterson.

[fol. 196] Q. What is your job?

A. Messenger.

Q. How long have you been there, how long have you worked there?

A. About a year and a half.

Q. Raymond, I show you paper which has been marked Defendants' Exhibit No. 1 in this case, did you ever see that?

A. Yes, sir.

Q. In connection with your work in Cleveland? Where did you first see it?

A. Mr. Morley handed it to me and told me to serve it on Mr. John Dexter.

Q. How many copies did he give you?

A. One original and one copy.

Q. Where did you go with them?

A. To the Society for Savings Bank Building.

Q. Whom did you inquire for?

A. I went to the guard at the Society for Savings Bank and asked for Mr. John Dexter. He told me there was a bank meeting and he would not be back until twelve, so I waited until about 12:15 and decided I would go to lunch and come back and catch him in, and I came back, I think it was about one o'clock, and I was just a few minutes late, he had gone out to lunch, and I went back and told Mr. Morley and said I would stop in and catch him on my way to court, and I went to his office then and the guard told me he was in and he pointed Mr. Dexter out to me and told me to go right over to him, so I went over to him and handed him the papers. At first I addressed him as Mr. Dexter, is this Mr. Dexter and he said yes and I handed him the papers. He looked them over and examined them and I told him to sign the copy and keep the original.

Q. Did he sign the copy?

A. Yes, sir.

Q. Did you see the name, J. H. Dexter, was that put on in your presence, Raymond?

A. Yes, sir.

Q. By whom was it signed?

A. By John H. Dexter.

Q. Was that all that occurred at that time?

A. Yes, sir.

Q. You left with him the original?

A. Yes, sir.

Q. And brought this with you and returned it to the office?

A. Yes, sir.

[fol. 197] Q. Since serving that paper, have you taken any steps to be more sure that it was Mr. Dexter who signed the paper?

A. Mr. Reeder took me down yesterday afternoon and introduced me to Mr. Dexter and it was the same man I served. He admitted it and said "are you the young man who served the papers?" and I said I was.

Witness dismissed.

COLLOQUY

Mr. Fraser: There are three papers I wanted marked as exhibits. If your Honors please, I offer in evidence a copy of Exhibit No. 4, being the original summons and return of the sheriff of Cuyahoga county of service upon the Irving Trust Company. For the sake of the record, if one is to be made, we desire to substitute a copy. And Defendants' Exhibit No. 3, which is a certified copy of the annual report returned to the Tax Commission of Ohio by the Irving Trust Company for 1931, certified over the signature of the secretary.

(Objection; overruled; exception.)

Mr. Fraser: And defendants' Exhibit No. 2, which is a certified copy of the report rendered by the Irving Trust Company to the same body for the year 1932.

(Objection; overruled; exception.)

Mr. Welles: On the hearing yesterday, as I recall it, early in Mr. Purcell's examination I asked him in substance

whether it wasn't a fact that he had signed the first set of subpœnas for the witnesses before the petition had been filed or any summons served, that is those calling for their appearance on June 6, 1932, and the court at that time ruled that that was immaterial and I don't think I made an offer to prove. I should like to offer to prove that if permitted to answer he would say he signed these subpœnas before the petition was filed or summons issued.

Judge Lloyd: If I remember correctly, you stopped by saying you didn't think it was material and as I remember I said we agreed with you, and with that it was dropped. We want you to have in whatever you think you should have in here.

[fol. 198] Mr. Welles: Perhaps counsel can stipulate.

Mr. Fraser: Reserving our objection to the materiality, we stipulate that he would so testify.

Mr. Welles: And it is agreed that any evidence offered by either side in any one of the three cases shall be considered as having been offered in all three cases.

Mr. Fraser: Subject to the same objections.

Plaintiff and defendant rest.

The foregoing, together with the exhibits hereto attached, namely, Plaintiff's Exhibits Nos. 1, 2, 3, 3a, 3b, 3c, 4, and 6 to 11, inclusive, and Defendants' Exhibits Nos. 1 to 4, inclusive, (no exhibit being numbered 5 and no exhibit number 5 being offered by either party or received in evidence) contains all the evidence given, offered or received by the court on the trial of the above-entitled action and proceedings.

Thereafter on the twenty-second day of June, 1932, the court found and adjudged in favor of the defendant and respondent, Joseph Zimmerman, as sheriff of Lucas county, and against the petitioner, and ordered the writ of habeas corpus issued herein discharged and the petitioner remanded to the custody of the respondent, to all of which petitioner in open court objected and excepted. Within three days thereafter petitioner filed in this court his written motion for a new trial of this cause, for the reasons therein set forth. Said motion having thereupon come on for hearing and having been argued and submitted to

the court, was overruled by the court; to which action and order of the court overruling his said motion, petitioner in open court, duly excepted.

ORDER SETTLING BILL OF EXCEPTIONS

And now comes the petitioner, by his counsel, and presents to the court this, his bill of exceptions, taken at said trial of said cause, and prays that the same may be settled, allowed, signed and sealed by the court, and ordered made a part of the record in said cause; all of which is accordingly done on the twenty-third day of June, A. D. 1932.

Harry W. Lloyd, Presiding Judge; S. S. Richards,
Roy H. Williams, Judges Court of Appeals.

[fol. 199] Received this bill of exceptions on this twenty-third day of June, A. D. 1932.

Harry W. Lloyd, Presiding Judge; S. S. Richards,
Roy H. Williams, Judges Court of Appeals.

[fol. 200] STATEMENT RE PLAINTIFF'S EXHIBIT 1

Plaintiff's Exhibit 1 (petition in case of Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants), appears in full at pages 136 to 157, supra, in this Transcript and is here incorporated by reference thereto as fully as if repeated verbatim.

[fols. 201 & 202] PLAINTIFF'S EXHIBIT 2.

IN COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 131,925

CLARA SIELCKEN-SCHWARZ, Plaintiff,

vs.

THE WOOLSON SPICE COMPANY et al., Defendants

DEMURRER OF THE DEFENDANT FRANKLIN H. BIGGS

Now comes the defendant Franklin H. Biggs and demurs to plaintiff's petition on the ground that it appears on its face:

1. That the plaintiff has not legal capacity to sue;

2. That the petition does not state facts which show a cause of action;

3. That there is a misjoinder of parties defendant;

4. That there is a defect of parties plaintiff;

4-a. That there is a defect of parties defendant;

5. That separate causes of action against defendants are improperly joined;

6. That the action was not brought within the time limited for the commencement of such actions;

7. That several causes of action are improperly joined.

Marshall, Melhorn, Marlar & Martin and Tracey, Chapman & Welles, Attorneys for Said Defendant.

[fols. 203 & 204] PLAINTIFF'S EXHIBIT 3

"Certificates of qualification under Ohio General Code, Sections 178 and 183, issued to the Irving Trust Company by the Secretary of State of Ohio, March 28, 1930." Omitted in printing.

[fol. 205] PLAINTIFF'S EXHIBIT 3A

Plaintiff's Exhibit 3A (Order of Commitment of appellant, C. N. Bevan) appears in full at pages 107 to 130, supra, of this Transcript and is here incorporated by reference thereto as fully as if repeated verbatim.

PLAINTIFF'S EXHIBIT 3B

(Notary's Writ of Attachment of Robert A. Stranahan.)

PLAINTIFF'S EXHIBIT 3C

(Notary's Writ of Attachment of John W. Koehrman.)

[fols. 206-210] PLAINTIFF'S EXHIBIT 4

"Statements of Irving Trust Company, filed with Secretary of State of Ohio on March 28, 1930, under Ohio General Code Section 178 and 183." Omitted in printing.

[fol. 211] PLAINTIFF'S EXHIBIT 6

STATE OF OHIO,
Lucas County:

COURT OF COMMON PLEAS

No. 131,925

CLARA SIELCKEN-SCHWARZ, Plaintiff,

vs.

THE WOOLSON SPICE COMPANY et al., Defendants

Notice to Take Depositions

The defendants will take notice, that on Monday the 13th day of June, A. D. 1932, the plaintiff above named, will take the depositions of sundry witnesses to be used as evidence on the trial of the above cause, at the office of Fraser, Hiett, Wall and Effler, 710 Home Bank Building, Toledo, in the County of Lucas, the State of Ohio, between the hours of nine-thirty (9:30) o'clock A. M. and six o'clock P. M. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

June 6, 1932. Dated June 6, 1932.

Fraser, Hiett, Wall & Effler, Attorneys for Plaintiff.

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said deposition may be taken, is hereby waived.

Tracy, Chapman & Welles, Attorneys for the Woolson Spice Company, John W. Koehrman, Franklin H. Biggs, Frank D. Stranahan, and Robert A. Stranahan.

STATE OF OHIO,
County of Lucas, ss:

R. B. Swartzbaugh, being first duly sworn, says that on Monday, June 6, 1932, at about two thirty o'clock P. M., he served a copy of the within deposition notice upon Mr. Leroy Eastman, one of the Administrators of the Estate of William A. Brigham, deceased, and a member of the

law firm of Smith, Baker, Effler and Eastman, which firm are attorneys for Ammi F. Mitchell and Leroy Eastman, Administrators of the Estate of William A. Brigham, deceased.

[fol. 212] Mr. Eastman acknowledged service of notice verbally but declined to do so in writing, and declined to enter any appearance.

(Signed) R. B. Swartzbaugh.

Sworn to before me and subscribed in my presence this 7th day of June, 1932. (Signed) L. A. Wilhelm, Notary Public, Lucas County, Ohio. (Notarial Seal.)

[fol. 213] PLAINTIFF'S EXHIBIT #7

Plaintiff's Exhibit #7 (Subpœna duces tecum served on appeliant, C. N. Bevan) appears in full at pages 104 to 106, supra, of this Transcript and is here incorporated by reference thereto as fully as if repeated verbatim.

PLAINTIFF'S EXHIBIT #8

(Subpœna duces tecum served on John W. Koehrman.)

PLAINTIFF'S EXHIBIT #9

(Subpœna served on Robert A. Stranahan.)

PLAINTIFF'S EXHIBIT #10

(Notary's writ of attachment of Robert A. Stranahan.)

PLAINTIFF'S EXEIBIT #11

(Opinion of Court of Appeals of New York in case of George C. Harrington, Administrator, vs. Eugene M. Keteltas et al., 92 N. Y. 40.)

[fol. 214] DEFENDANT'S EXHIBIT 1

THE STATE OF OHIO,
Lucas County, ss:

IN THE COURT OF COMMON PLEAS WITHIN AND FOR THE COUNTY OF LUCAS AND STATE OF OHIO

Case No. 131925

CLARA SIELCKEN-SCHWARZ, Plaintiff,

against

THE WOOLSON SPICE COMPANY et al., Defendants

The defendant Irving Trust Company, Executor, will take notice, that on Monday, the 13th day of June, A. D., 1932, the above-named plaintiff will take the depositions of John W. Koehrman, C. N. Bevan, Robert A. Stranahan, Frank D. Stranahan and sundry witnesses to be used as evidence on the trial of the above entitled cause, at the office of Fraser, Hiett, Wall & Effler, 710 Home Bank Building, in the City of Toledo, County of Lucas and State of Ohio between the hours of 9:30 o'clock A. M. and 8 o'clock P. M., of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

Baker, Hostetler, Sidlo & Patterson, Attorneys for Plaintiff.

I acknowledge service of the above notice, by copy, this 7th day of June, A. D. 1932.

J. H. Dexter, Agent for Defendant Irving Trust Company, Executor.

[fols. 215-217] DEFENDANT'S EXHIBIT 2

"State of Ohio Tax Return, 1932, Foreign Corporation; Annual Report of the Irving Trust Company, New York City, New York." Omitted in printing.

[fols. 218-220] DEFENDANT'S EXHIBIT 3

"State of Ohio Tax Return, 1931, Foreign Corporation, Annual Report of The Irving Trust Company, State of New York." Omitted in printing.

[fol. 221] DEFENDANT'S EXHIBIT 4

THE STATE OF OHIO,
Lucas County, ss:

To the Sheriff of Cuyahoga County:

You are commanded to notify Irving Trust Company, a foreign corporation as executor of the last will and testament of Herman Sielcken, deceased, that it has been sued by Clara Sielcken-Schwarz in the Court of Common Pleas of Lucas County, and that unless it answer by the second day of July, 1932, the petition of said plaintiff against it filed in the clerk's office of the said court, such petition will be taken as true and judgment rendered acordingly.

You will make due return of this summons on the thirteenth day of June, A. D. 1932.

Witness Geo. E. Hardy, clerk of our said court, and the seal thereof hereto affixed, at Toledo, this second day of June, A. D. 1932.

Geo. E. Hardy, Clerk. M. E. Theuerkauff, Deputy Clerk.

THE STATE OF OHIO,
Cuyahoga County, ss:

Received this writ June 2, 1932, and pursuant to its command, on the second day of June, 1932, at 2:20 p. m. I served the defendant, Irving Trust Company, a foreign corporation, as executor of the last will and testament of Herman Sielcken, deceased, by delivering to John H. Dexter, the duly authorized and designated managing agent of said defendant within this state, and the person duly authorized and designated as provided by law upon whom process against said corporate defendant may be served within this state, a copy of the summons with all endorsements thereon.

John M. Sulzmann, Sheriff. Jas. M. Gallagher, Deputy.

[fol. 222] In Court of Appeals of Lucas County, Ohio

C. A. No. 2691

Ex Parte C. N. Bevan

C. A. No. 2692

Ex Parte John W. Koehrman

C. A. No. 2693

Ex Parte Robert A. Stranahan

In Habeas Corpus

June 22nd, 1932.

Messrs. Tracy, Chapman & Welles and Messrs. Marshall, Melhorn, Marlar & Martin for petitioners.

Messrs. Fraser, Hiett, Wall & Effler and Messrs. Baker, Hostetler, Sidlo & Patterson for respondents.

Opinion

Williams, J.:

These actions, founded on applications for writs of habeas corpus, are brought to secure the discharge of certain witnesses who were committed by a notary public for refusing to appear and to produce certain books and for refusing to testify in the taking of depositions in an action for equitable relief brought by Clara Sielcken-Schwarz, plaintiff, against The Woolson Spice Company and other defendants in the court of common pleas of Lucas County, Ohio. The petition in that cause was filed June 2, 1932 and summons was issued and served upon all of the defendants except Marion A. Miller, who could not be found within the county. On the same day, notice of taking depositions on behalf of plaintiff was served upon the same defendants, but no depositions were taken under this notice. A new notice was served upon the same defendants on June 6th, 1932, for the taking of depositions on June 13, 1932. Subpœnas to appear and testify and produce certain books and records were served upon the petitioners Bevan and Koehrman, and a simple subpœna upon the petitioner Stranahan. Bevan appeared on June 13, 1932 and answered a few ques-

tions, but refused to answer others. He further refused to produce books and records described in his subpœna. Both Koehrman and Stranahan disobeyed the subpœnas and [fol. 223] failed to appear. For contempt in refusing to answer questions and in refusing to produce books, papers and documents, the notary public ordered that Bevan be imprisoned in the county jail until he should submit to testify, and he was held in custody under this order of the notary at the time he sued out the writ of habeas corpus. Attachments were issued for Koehrman and Stranahan and they were arrested and held thereunder at the time the writs of habeas corpus were sued out for their release.

Many reasons are presented why the petitioners should be discharged, and we will discuss these questions in their order.

In the first place it is contended that the questions asked the witness Bevan were not material. In the action brought in the court of common pleas the plaintiff charged certain of the defendants with conspiring to fraudulently acquire the stock of Herman Sielcken in The Woolson Spice Company at a price far below its true value by wrongfully ousting him as president during his temporary stay in Germany and unlawfully causing the stock to be sold. Many of the questions put to the witness Bevan, which he refused to answer, were proper and material, and well calculated to elicit testimony tending to prove the allegations of the petition, and the books and records required to be produced by the subpœna duces tecum served upon him would undoubtedly, if produced, have a material bearing on the matters under inquiry. This contention is therefore not well-founded.

It is also contended by petitioners that the petition filed in the common pleas court does not state a cause of action and the plaintiff does not have legal capacity to sue. As to the sufficiency of the petition, that is properly a question for the determination of the court in which the action is pending. However, in our judgment, depositions may be taken as a rule even though the petition does not state a cause of action, for it is not necessary that there should be an existing, as distinguished from a potential, issue of fact. It has even been held that they may be taken while error proceedings are pending in the reviewing court.

Fairchild v. Lake Shore Electric Railway Co., 101 Ohio St., [fol. 224] 261.

As to the legal capacity of plaintiff to sue, there are numerous authorities to the effect that where a personal representative of the decedent's estate refuses to bring an action for the collection of assets, an heir or devisee may bring the action and make the personal representative a party defendant.

24 C. J., 797, Sec. 1981;
11 R. C. L., 262, Sec. 297;
See annotations in 22 L. R. A., 458, and
20 Amer. & Eng. Anno. Cases, 96.

The subpœnas duces tecum did not require the production of private and privileged papers, so far as the evidence discloses, and were not so indefinite that the parties upon whom they were served were justified in entirely ignoring them, nor is it a justification for refusing to obey a subpœna or to give testimony that witnesses are in good health and expect to be present at the trial.

In re Berger, 13 Ohio App., 206; affirmed 101 Ohio St., 512;
14 Ohio Jurisprudence, 10, Sec. 5;
Mathias vs. Poe, 20 Court of Appeals Opinions, Sixth District, unreported, 276.

The evidence adduced on hearing in this court shows that the depositions were being taken in good faith and we cannot say that there was any ulterior motive or improper purpose in taking them. Section 11526, G. C., gives either party the right to commence taking testimony by deposition at any time after service upon the defendant, and this right has been recognized by our Supreme Court and no party should be deprived of it without good cause. In re Rauh, 65 Ohio St., 128.

The petitioners also make the novel contention that in attempting to punish for contempt the notary exercised judicial power in violation of Sec. 1 of Art. IV, Sec. 8 of Art. II and Section 32 of Art. II of the Constitution of Ohio, that Sections 11510, 11511 and 11512, G. C., are unconstitutional, if construed to give the notary power so to [fol. 225] adjudicate, that such attempted adjudication being made in the absence of the petitioner, without notice to him, or hearing, and without him being present or repre-

sented by counsel, or having opportunity to know of the charge against him, was in violation of the Constitution of Ohio and the 14th amendment to the Constitution of the United States, and that the notary public was disqualified to sit in judgment upon the petitioners by reason of his personal pecuniary interest. It is a complete answer to the contention so made by the petitioners that the notary public, in committing the witness to jail for refusing to answer questions and in issuing an attachment for the witnesses who refused to respond to subpœna, does not exercise judicial power.

De Camp vs. Archibald, 50 Ohio St., 618;
Benckenstein vs. Schott, 92 Ohio St., 29, 38.

Marion A. Miller was not served with process and is not a party to the suit, and may never be. In fact, there is no good reason why the cause may not be tried in the court of common pleas without obtaining service on Miller, as he does not seem to be a necessary party. However that may be, depositions may be used against parties who were served with notice and upon trial the depositions may be received against all defendants, if the one not receiving notice of the taking of them waives objection. Ryan vs. Conner, 40 Ohio St., 368.

At any rate, the plaintiff might properly proceed to take depositions, although Miller had not been served with notice.

Many of the questions raised would, if decided, require this court to anticipate decisions of the court of common pleas. Questions of the sufficiency of pleadings are, in the first instance at least, properly questions for the determination of the court in which the pleadings are filed. We cannot decide in advance questions made in the court in which the original action pends, and what has been said is by way of argument only.

[fol. 226] We have no hesitancy in reaching the conclusion that the contentions of the petitioners are not well-founded and that the petitions should be dismissed.

Petitions dismissed.

Lloyd and Richards, JJ., concur.

Approved:

Roy H. Williams, Judge. (Seal.)

[fol. 227] Certificate of Lodgment omitted in printing.

[fol. 228] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 229] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed—Filed March 20, 1933

The appellant in the above entitled cause states that the points upon which he intends to rely in this court in this case are as follows:

1. The Supreme Court of Ohio erred in holding that the General Assembly of Ohio did not violate any provision of the Federal Constitution in the enactment of Ohio General Code Sections 11510, 11511 and 11512, and in not finding and adjudging that said sections and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty or property, without due process of law".

2. The Supreme Court of Ohio erred in finding and adjudging that Ohio General Code Section 11514, which provides that a witness imprisoned by an officer under Ohio General Code Sections 11510, 11511 and 11512, may, after [fol. 230] being imprisoned, apply to a judge of the Supreme Court, Court of Appeals, Common Pleas or Probate Court, of Ohio, who may discharge such witness if it appears that his imprisonment is illegal, affords due process of law to the appellant, who was committed by a notary public under said Sections 11510, 11511 and 11512 and erred in not holding that said Sections 11510, 11511 and 11512 construed together with Section 11514, are in conflict with and violate the provisions of Section 1 of the Fourteenth

Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment to the Constitution of the United States which provides that no state "shall deprive any person of life, liberty, or property without due process of law".

3. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511, 11512 and 11514 and each of them are constitutional and do not deny the appellant due process of law, and erred in not finding and adjudging that said sections and each of them are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty or property without due process of law", in that (a) such sections as construed by the Supreme Court of Ohio, purport to authorize and empower a notary public in the course of the taking of depositions, at will to commit and imprison a witness, who under the law of Ohio may lawfully refuse to give evidence not pertinent to the issues made or tendered by the pleadings, for contempt in failing or refusing to appear and answer questions or produce documentary evidence, without con- [fol. 231] ferring upon such notary public, or upon any judicial tribunal, the power judicially to hear and determine, before the commitment and imprisonment of the witness, the question of the materiality, relevancy and competency of the evidence demanded and the guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral action brought by the witness after his imprisonment, and in which he assumes the burden; and in that (b) no opportunity is afforded by said sections, or by the law of Ohio, for submitting fundamental questions arising under the Constitution of the United States and as to the jurisdiction of the notary public to the determination of a competent judicial tribunal before the witness is declared to be guilty of contempt and imprisoned by the order of the notary public.

4. The Supreme Court of Ohio erred in not finding and adjudging that the operation of Ohio General Code Sections 11510, 11511 and 11512 and each of them, as applied to the facts of this case, is in conflict with and violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty or property, without due process of law", in that no provision is made by said sections or by the law of Ohio for a hearing by the notary public, before whom depositions are being taken for use in a civil cause pending in a state court, before such notary finds and adjudges, or attempts to find and adjudge, a person to be guilty of contempt and commits such person to jail, or for a notice of such hearing to one charged with having been guilty of contempt, and no opportunity is af- [fol. 232] forded to persons so charged to appear and defend in person or by counsel, and in that said sections provide, or attempt to provide, that the notary public might commit this appellant for contempt, without notice of any hearing to this appellant, and without providing or affording an opportunity for this appellant to be present at a hearing and to defend in person or by counsel before finding and adjudging said appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail of Lucas County, Ohio, and in that in this case the notary public did not in fact give appellant any notice of any hearing, or afford to appellant an opportunity for him to be present at a hearing and defend in person or by counsel, before finding and adjudging appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail of Lucas County, under which order appellant was wrongfully arrested and confined by the defendant in error (appellee).

5. The Supreme Court of Ohio erred in not finding and adjudging that the attempted adjudication by the notary public, before whom depositions were being taken for use in a civil cause pending in a state court, that any questions propounded to appellant and any books, papers or documents ordered to be produced by him were material to any issue in the case in which it was attempted to take

said depositions, and the attempted adjudication that appellant was in contempt, and the issuing of an order of commitment, all in the absence of the appellant and without notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of appellant's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States and were null and void, contravening that part of said amendment which provides in part that no state "shall deprive any person of life, liberty, or property, without due process of law".

[fol. 233] 6. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11510, 11511 and 11512 and each of them, and the operation of said sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of the Fourteenth Amendment of the Constitution of the United States in that they attempt and purport to confer on notaries public arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to order or to refuse to order that questions propounded to witnesses be answered or that books, papers and documents be produced, and to commit or to withhold commitment as for contempt of witnesses who refuse to answer questions propounded to them and ordered to be answered by said notaries public or to produce books, papers or documents ordered to be produced by said notaries public, without regard to the materiality, relevancy or competency of such questions or such books, papers or documents.

7. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11503, 11510, 11511, and 11512, and each of them are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that they attempt to confer upon notaries public, who, under the laws of Ohio are ministerial executive officers vested with no power to hear and determine, the peculiarly and inherently judicial power to imprison summarily as for alleged contempt of them occurring in their presence, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

[fol. 234] 8. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511 and 11512 and each of them, and the operations of said sections and each of them as applied to the facts in this case do not deny this appellant due process of law and are not unconstitutional, repugnant to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that as construed by the Supreme Court of Ohio, said sections purport to authorize and permit the commitment and imprisonment of this appellant by a notary public who as in this case was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the said notary public's compensation being by law directly governed by the extent of the evidence the witness (this appellant) might be required to give, and the said notary public having a direct, substantial, personal pecuniary interest in the taking of the deposition and in coercing the witness (this appellant) to testify; and in that the said notary public was thereby disqualified from determining whether this petitioner was guilty of contempt for failing or refusing to give the evidence demanded and disqualified from ordering this appellant committed.

9. The Supreme Court of Ohio erred in not finding and adjudging that the notary public ordering appellant's commitment had a direct, substantial, personal pecuniary interest in the taking of appellant's depositions for use in a civil cause pending in a state court, and in attempting to coerce and compel appellant to testify and to produce the books, papers and documents referred to in the order of commitment issued by said notary for this appellant and in finding and adjudging this appellant guilty of contempt and issuing said order of commitment, and in not finding and adjudging that said notary public was disqualified and without jurisdiction so to act and adjudge by reason of the fact that said notary was selected, employed and paid by [fol. 235] the plaintiff in the alleged pending suit in which it was attempted to take appellant's deposition, said alleged judgment and order of commitment being made at the request of the plaintiff in said alleged pending suit, and said notary public's employment being upon such terms

that its extent and continuance and his continued compensation and the amount thereof were contingent upon and directly governed by procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and order of commitment, so that said notary public's acts in so adjudging and bringing about the appellant's commitment and detention were a denial of due process of law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and were null and void, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty or property without due process of law".

10. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11503, 11510, 11511 and 11512 and each of them, and the operation of such sections and each of them, as applied to the facts in this case are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive the appellant of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty or property without due process of law".

Appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of the case:

[fol. 236] Title of paper	Record page
1. Return of Clerk of Supreme Court of Ohio	1
2. Petition for Appeal	2–4
3. Assignment of Errors	6–13
4. Statement particularly disclosing Basis upon which appellant contends that the Supreme Court of the United States has jurisdiction upon appeal to Review the Judgment of the Supreme Court of Ohio	15–21
5. Order allowing Appeal	23–24
6. Citation and Acknowledgment of Service	26
7. Stipulation as to Transcript of Record on Appeal	28–32

Title of paper	Record page
8. Statement to Respondent-Appellee re Paragraph 3, Rule 12, of the Supreme Court of the United States and acknowledgment of service	34–35
9. Appellee's Statement making against the Jurisdiction asserted by Appellant	37–59
10. Supersedeas and Appeal Bond	61–62
11. Petition in Error in Supreme Court of Ohio	63–69
12. Entry of Appearance in Supreme Court of Ohio	70
13. Journal Entry substituting Sheriff	71
14. Motion for Stay of Execution and Advancement of Cause	72–73
15. Order of Supreme Court of Ohio granting said Motion for Stay of Execution and advancement of cause	77
16. Supersedeas Bond in Supreme Court of Ohio	78
17. Judgment of the Supreme Court of Ohio	79
18. Journal Entry Substituting Sheriff	80
19. Opinion of Supreme Court of Ohio, with certificate of Reporter	81–95
20. Transcript of Docket Entries in Court of Appeals, Lucas County, Ohio	96–97
21. Transcript of Journal Entries in Court of Appeals, Lucas County, Ohio	98–100
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22. Petition for Writ of Habeas Corpus	101–103
23. Subpœna Duces Tecum on C. N. Bevan	104–106
24. Notary's Order of Commitment	107–130
25. Amendment to Petition for Writ of Habeas Corpus	131–135
26. Petition for Equitable Relief, in case Clara Sielcken Schwarz, plaintiff, v. The Woolson Spice Company et al., defendants, #131925, Common Pleas Court of Lucas County, Ohio	136–157
27. Writ of Habeas Corpus and Sheriff's Return	158
28. Page containing reference to "writ and commitment papers" referred to in Sheriff's Return, and Sheriff's Return of Service of the Order of Commitment	159

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29. Recognizance, filed in Court of Appeals of Lucas County, Ohio	160
30. Motion for New Trial, filed in Court of Appeals of Lucas County, Ohio	161–165
31. Bill of Exceptions	166–199
32. Page containing reference to plaintiff's exhibit 1 (Petition for Equitable Relief)	200
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34. Print only title of Plaintiff's Exhibit 3, as follows: "Certificates of qualification under Ohio General Code Sections 178 and 183 issued to The Irving Trust Company by the Secretary of State of Ohio, March 28, 1930"	203
35. Page containing reference to Plaintiff's Exhibit 3-A (Notary's Order of Commitment) and Titles of Plaintiff's Exhibits 3-B and 3-C	205
36. Print only title of Plaintiff's Exhibit 4 as follows: "Statements of Irving Trust Company, filed with Secretary of State of Ohio on March 28, 1930, under Ohio General Code Sections 178 and 183"	206
37. Plaintiff's Exhibit 6 (Notice to take depositions and Proof of Service	211–212
38. Page containing reference to Plaintiff's Exhibit 7 (Subpœna Duces Tecum on C. N. Bevan), and titles of Plaintiff's Exhibits 8 to 11 inclusive	213
39. Defendant's Exhibit 1 (Notice to take depositions)	214
[fols. 238 & 239]	
40. Print only title of Defendant's Exhibit 2, "State of Ohio Tax Return, 1932, Foreign Corporation; Annual Report of The Irving Trust Company, New York City, New York"	215
41. Print only title of Defendant's Exhibit 3, "State of Ohio Tax Return, 1931, Foreign Corporation, Annual Report of The Irving Trust Company, State of New York"	218
42. Defendant's Exhibit 4 (Summons and return of service)	221

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43. Opinion of Court of Appeals of Lucas County, Ohio	222–226
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45. Authentication of Record	228

Dated March 17, 1933.

Crary Davis, Geo. D. Welles, Counsel for Appellant. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

Acknowledgment of Service.

Due service, and receipt of copy, of the Appellant's foregoing Statement of Points to be relied upon and Designation of the parts of the record to be printed are acknowledged.

March 18th, 1933.

Newton D. Baker, Raymond T. Jackson, John C. Morley, Harold W. Fraser, Counsel for Appellee.

[fol. 240] [File endorsement omitted.]

Endorsed on cover: File No. 37,481. Ohio Supreme Court. Term No. 784. Charles N. Bevan, appellant, vs. David M. Krieger, as Sheriff of Lucas County, Ohio. Filed March 16, 1933. File No. 37,481.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 785

JOHN W. KOEHRMAN, APPELLANT,

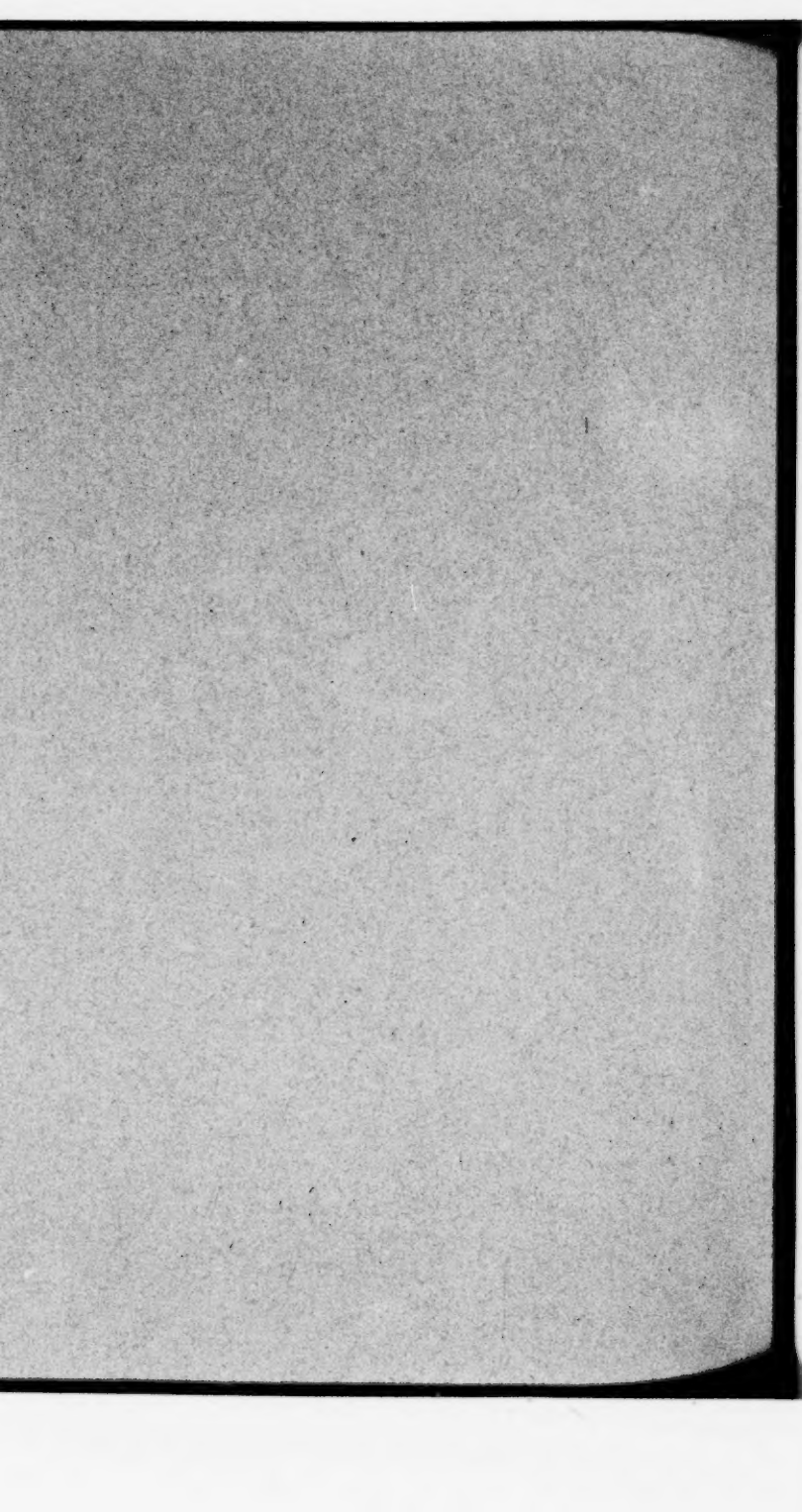
vs.

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED MARCH 16, 1933

(37,482)



(37,482)

PREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 785

JOHN W. KOEHRMAN, APPELLANT,

vs.

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO

PPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fol. 1] Return of clerk omitted in printing

[fol. 2] **IN SUPREME COURT OF OHIO**

No. 23653

Ex Parte JOHN W. KOEHRMAN, Plaintiff-in-error

PETITION FOR APPEAL FROM THE SUPREME COURT OF OHIO TO THE SUPREME COURT OF THE UNITED STATES—Filed Feb. 10, 1933

To the Chief Justice of the Supreme Court of Ohio:

The petitioner, John W. Koehrman, is the plaintiff-in-error in the above entitled case.

On the fourteenth day of June, 1932, petitioner commenced his suit in the Court of Appeals for Lucas County, Ohio, seeking his discharge from imprisonment by the Sheriff of Lucas County, Ohio, under an order of attachment issued by one William Purcell, a notary public, for an alleged contempt of said notary occurring during an attempt to take depositions before said Notary Public in a certain action, entitled "Clara Sielcken-Schwarz, Plaintiff, v. The Woolson Spice Company, et al., Defendants", numbered 131925 on the docket of the Common Pleas Court of Lucas County, Ohio. Final judgment was rendered against the petitioner by said Court of Appeals and by said judgment he was remanded to the custody of said Sheriff, the respondent herein.

After said judgment the petitioner filed his petition-in-error in this cause in the Supreme Court of Ohio, seeking a reversal of the said judgment of the said Court of Appeals; and, after hearing, the Supreme Court of Ohio, on January 25th, 1933, made and entered its final decision and judgment herein affirming the judgment of the said Court of Appeals.

The Supreme Court of Ohio is the highest court of the State of Ohio in which a decision could be had in said suit, and its said judgment is final.

In this suit there is drawn in question the validity of certain statutes of the State of Ohio, viz., Ohio General Code Sections 11510, 11511 and 11512, on the ground that they [fol. 3] and each of them, and the operation of said sections and each of them, as applied to the facts in this case deprive the petitioner of liberty and property without due process of law and are repugnant to the Constitution of the United States, and particularly to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the decision of the Supreme Court of Ohio is in favor of their validity.

There is also drawn in question in this suit the validity of certain other statutes of the State of Ohio, viz. Ohio General Code Sections 11497, 11503 and 11514 on the ground that they and each of them and the operation of said sections and each of them, as applied to the facts in this case, likewise deprive the petitioner of liberty and property without due process of law and are repugnant to the Constitution of the United States, and particularly to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the decision of the Supreme Court of Ohio is in favor of their validity.

Manifest error has occurred, to this petitioner's prejudice, as shown herein and in the assignment of errors filed herewith, in which are more fully set out the errors complained of.

In accordance with the Rules of the Supreme Court of the United States Rule 46, par. 2) the petitioner respectfully shows that this case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Stat. 54; 28 U. S. C. A. Sec. 861 (a)) was passed, viz., under 28 U. S. C. A. Section 344, a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

Wherefore petitioner prays for the allowance of an appeal from said Supreme Court of Ohio to the Supreme Court of the United States, in order that the decision and judgment of the Supreme Court of Ohio may be examined and reversed and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of Ohio, may be sent to the [fol. 4] Supreme Court of the United States, as provided

by law. Petitioner, desiring the appeal to be a supersedeas, also prays that an order be made fixing the amount of security which petitioner as appellant, shall give and furnish upon said appeal, and that upon the giving of said security, all further proceedings in this court be suspended and stayed, and the supersedeas granted by this court to the judgment of the Court of Appeals of Lucas County, Ohio, remain in force until the determination of said appeal by the Supreme Court of the United States.

George D. Welles, Crary Davis, Attorneys for Petitioner. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

[fol. 5] [File endorsement omitted.]

[fol. 6] IN SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Feb. 10, 1933

Plaintiff-in-error, John W. Koehrman, hereinafter referred to as appellant, in connection with and as a part of his petition for an appeal herein to the Supreme Court of the United States, assigns the following errors in the record and proceedings in this case upon which he will rely upon said appeal:

First. The Supreme Court of Ohio erred in affirming the judgment of the Court of Appeals of Lucas County, Ohio, and in refusing to reverse the judgment of said court.

Second. The Supreme Court of Ohio erred in not finding and adjudging that this appellant was wrongfully and illegally imprisoned without due process of law, in violation of his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in not ordering appellant discharged.

Third. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11503, 11510, 11511 and 11512 and each of them, and the operation of such sections and each of them as applied to

the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty, or property, without due process of law".

Fourth. The Supreme Court of Ohio erred in holding that the General Assembly of Ohio did not violate any provision of the Federal Constitution in the enactment of [fol. 7] Ohio General Code Sections 11510, 11511 and 11512, and in not finding and adjudging that said sections, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

Fifth. The Supreme Court of Ohio erred in finding and adjudging that Ohio General Code Section 11514, which provides that a witness imprisoned by an officer under Ohio General Code Sections 11510, 11511 and 11512, may after being imprisoned, apply to a judge of the Supreme Court, Court of Appeals, Common Pleas or Probate Court, of Ohio, who may discharge such witness if it appears that his imprisonment is illegal, affords due process of law to the appellant, who was arrested and deprived of his liberty by order of a notary public under said Sections 11510, 11511 and 11512, and erred in not holding that said Sections 11510, 11511 and 11512, construed together with Section 11514, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment to the Constitution of the United States which provides that no State "shall deprive any person of life, liberty, or property, without due process of law."

Sixth. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511, 11512 and 11514, and each of them, are constitutional and do not deny the appellant due process of law, and erred in not finding and adjudging that said sections, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law", in that (a) such sections as construed by [fol. 8] the Supreme Court of Ohio, purport to authorize and empower a notary public in the course of the taking of depositions, at will to commit and imprison a witness, who under the law of Ohio may lawfully refuse to give evidence not pertinent to the issues made or tendered by the pleadings, for contempt in failing or refusing to appear and answer questions or produce documentary evidence, without conferring upon such notary public, or upon any judicial tribunal, the power judicially to hear and determine, before the commitment and imprisonment of the witness, the question of the materiality, relevancy and competency of the evidence demanded and the guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral action brought by the witness after his imprisonment, and in which he assumes the burden; and in that (b) no opportunity is afforded by said sections, or by the law of Ohio, for submitting fundamental questions arising under the Constitution of the United States and as to the jurisdiction of the notary public to the determination of a competent judicial tribunal before the witness is declared to be guilty of contempt and imprisoned by the order of the notary public.

Seventh. The Supreme Court of Ohio erred in not finding and adjudging that the operation of Ohio General Code Sections 11510, 11511 and 11512 and each of them, as applied to the facts of this case, is in conflict with and violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, contravening that part of said amendment which provides that no State

shall "deprive any person of life, liberty, or property, without due process of law", in that no provision is made by said sections or by the law of Ohio for a hearing by the notary public, before whom depositions are being taken for use in a civil cause pending in a state court, before such notary finds and adjudges, or attempts to find and adjudge, a person to be guilty of contempt and commits such person to jail, or for a notice of such hearing to one charged with having been guilty of contempt, and no opportunity is afforded to persons so charged to appear and defend in person or by counsel, and in that said sections provide, or attempt to provide, that the notary public might [fol. 9] commit this appellant for contempt, without notice of any hearing to this appellant, and without providing or affording an opportunity for this appellant to be present at a hearing and to defend in person or by counsel, before finding and adjudging said appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail.

Eighth. The Supreme Court of Ohio erred in not finding and adjudging that the attempted adjudication by the notary public, before whom depositions were being taken for use in a civil cause pending in a state court, that any questions that might be propounded to appellant and any books, papers or documents ordered to be produced by him were material to any issue in the case in which it was attempted to take said depositions, and his attempted adjudication that appellant was in contempt, and the issuing of an order of attachment under which appellant was arrested and deprived of his liberty, all in the absence of the appellant and without notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of appellant's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States and were null and void, contravening that part of said amendment which provides in part that no State "shall deprive any person of life, liberty, or property, without due process of law".

Ninth. The Supreme Court of Ohio erred in not holding that appellant has, without due process of law and in vio-

lation of his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, been unlawfully deprived of his liberty in actual fact by reason of an order given by one of counsel for a party in a civil cause in the Court of Common Pleas of Lucas County, Ohio, to a notary public and carried into effect by such notary public, who had been employed by such counsel for the purpose of enabling such counsel to engage in an unreasonable search and seizure of books, papers and records in appellant's possession, and that by express direction of such counsel said unlawful commitment was made by said notary public without judicial hearing of any kind, [fol. 10] and that appellant was in fact deprived of his liberty by the acts and orders of such counsel, pretending to comply with the form of law through the use of the signature of said notary public on the order of attachment issued for and under which appellant was arrested and deprived of his liberty.

Tenth. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11510, 11511 and 11512 and each of them, and the operation of said sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of the Fourteenth Amendment to the Constitution of the United States in that they attempt and purport to confer on notaries public arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to order or to refuse to order that questions propounded to witnesses be answered or that books, papers and documents be produced, and to commit or to withhold commitment as for contempt of witnesses who refuse to answer questions propounded to them and ordered to be answered by said notaries public or to produce books, papers or documents ordered to be produced by said notaries public, without regard to the materiality, relevancy or competency of such questions or such books, papers or documents.

Eleventh. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11503, 11510, 11511 and 11512, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that

they attempt to confer upon notaries public, who under the laws of Ohio are ministerial executive officers vested with no power to hear and determine, the peculiarly and inherently judicial power to attach and imprison a witness summarily as for alleged contempt of them; contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty or property, without due process of law."

[fol. 11] Twelfth. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections, and each of them, as applied to the facts in this case, do not deny this appellant due process of law are not unconstitutional, repugnant to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that as construed by the Supreme Court of Ohio, said sections purport to authorize and permit the attachment and the imprisonment of this appellant by a notary public who as in this case was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the said notary public's compensation being by law directly governed by the extent of the evidence the witness (this appellant) might be required to give, and the said notary public having a direct, substantial, personal, pecuniary interest in the taking of the deposition and in coercing the witness (this appellant) to testify; and in that the said notary public was thereby disqualified from determining whether this appellant was guilty of contempt and from issuing any order of attachment against the appellant and bringing about appellant's arrest and detention.

Thirteenth. The Supreme Court of Ohio erred in not finding and adjudging that the notary public ordering appellant's attachment and detention had a direct, substantial, personal, pecuniary interest in taking of appellant's depositions for use in a civil cause pending in a state court, and in attempting to coerce and compel appellant to testify and to produce the books, papers, and documents which appellant was ordered to produce and in finding and adjudg-

ing this appellant guilty of contempt and issuing said order of attachment, and in not finding and adjudging that said notary public was disqualified and without jurisdiction so to act and adjudge or to cause appellant's attachment and detention by reason of the fact that said notary was selected, employed and paid by the plaintiff in the alleged pending suit in which it was attempted to take appellant's deposition, said alleged judgment and order of attachment being made at the request of the plaintiff in said alleged pending suit, and said notary public's employment being [fol. 12] upon such terms that its extent and continuance and his continued compensation and the amount thereof were contingent upon and directly governed by procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and order of attachment, so that said notary public's acts in so adjudging and bringing about the appellant's arrest and detention were a denial of due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and were null and void, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty or property without due process of law."

Fourteenth. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11503, 11510, 11511 and 11512 and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive the appellant of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

Fifteenth. The Supreme Court of Ohio erred in holding that the Court of Appeals of Lucas County, Ohio, likewise did not err in holding as stated in each of the foregoing assignments of error numbered second to fourteenth, inclusive.

Wherefore the petitioner prays that the said judgment of the Supreme Court of Ohio, dated January 25th, 1933, in the above entitled cause, be reversed and that judgment be rendered in his favor.

Dated February 10th, 1933.

George D. Welles, Crary Davis, Counsel for Appellant. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

[fols. 13-21] [File endorsement omitted.]

[fol. 22] IN SUPREME COURT OF OHIO

No. 23653

EX PARTE JOHN W. KOEHRMAN, Plaintiff-in-error.

ORDER ALLOWING APPEAL—Filed Feb. 10, 1933

The plaintiff-in-error and appellant, John W. Koehrman, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of Ohio on the 25th day of January, 1933, and from each and every part thereof, and having presented and filed his petition for appeal, assignment of errors, prayer for reversal and his statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the said judgment of the Supreme Court of Ohio, all pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now hereby ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of Ohio in the above entitled cause as provided by law, and it is further ordered that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said court within forty days of this date.

It is further ordered that said appellant shall give good and sufficient security in the sum of $1,000.00, that said appellant shall prosecute said appeal to effect and if said appellant fail to make his plea good, he shall answer all damages and costs; that upon the appellant's giving said security, the appeal shall operate as a supersedeas and stay [fol. 23] of execution and other proceedings under said judgment of the Supreme Court of Ohio pending such appeal and appellant shall be enlarged pending such appeal.

Dated February 10th, 1933.

Carl W. Wygantt, Chief Justice of the Supreme Court of Ohio. —— ——, Associate Justice of the Supreme Court of the United States.

[fol. 24] [File endorsement omitted.]

[fols. 25 & 26] Citation, in usual form, showing service on David M. Krieger et al., filed February 15, 1933, omitted in printing.

[fol. 27] IN SUPREME COURT OF OHIO

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD ON APPEAL—Filed March 3, 1933

It is hereby stipulated by and between counsel for the appellant, John W. Koehrman, and counsel for the appellee, David M. Krieger, as Sheriff of Lucas County, Ohio, that the Clerk of the Supreme Court of Ohio shall make a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause and shall include in such transcript of record the following and no other papers and exhibits:

1. Title page and caption;

2. Petition-in-error filed in the Supreme Court of Ohio on June 24, 1932, and Entry of Appearance by defendant-in-error, filed with the Clerk of the Supreme Court of Ohio, on June 25, 1932;

3. Transcript of Docket and Journal Entries in Court of Appeals, Lucas County, Ohio, filed with the Clerk of the Supreme Court of Ohio on July 23, 1932;

4. The pleading which bears title "Petition for Writ of Habeas Corpus", filed in Court of Appeals, Lucas County,

Ohio, on June 14, 1932, (which pleading appellant claims to be a petition for Writ of Habeas Corpus and appellee claims to be an Application for Discharge from Imprisonment under O. G. C. Sec. 11514); together with Exhibits attached to said petition, said Exhibits being the Subpoena Duces Tecum upon this appellant, John W. Koehrman, and the writ of attachment of this appellant, John W. Koehrman.

5. The pleading bearing the title "Amendment to Petition for Writ of Habeas Corpus", filed in Court of Appeals, [fol. 28] Lucas County, Ohio, on June 15, 1932, (which pleading appellant claims to be an amendment to his Petition for a writ of Habeas Corpus and appellee claims to be an Amendment to an Application for Discharge from Imprisonment under O. G. C. Sec. 11514); together with Exhibit A, attached thereto, which Exhibit A is the petition filed in the Court of Common Pleas, Lucas County, Ohio, in case entitled "Clara Sieleken Schwarz, New York plaintiff, v. The Woolson Spice Company, et al., defendants."

6. Writ bearing the title "Writ of Habeas Corpus" filed with the Clerk of said Court of Appeals, Lucas County, Ohio, on June 15, 1932, (which writ appellant claims to be a Writ of Habeas Corpus and appellee claims to be a Writ issued upon an Application for Discharge from Imprisonment under O. G. C. Sec. 11514), together with the Sheriff's Return thereto; the writ and attachment papers attached to said return to be shown only by incorporating, by reference, the order of attachment and subpœna duces tecum attached as exhibits to the Pleading (referred to in paragraph numbered 4 of this Stipulation) bearing the title of "Petition for Writ of Habeas Corpus"; the Sheriff's return to said order of attachment and the Notary's return of service of said subpœna to be here included in full;

7. Recognizance, filed with the Clerk of said Court of Appeals of Lucas County, Ohio, on June 17, 1932;

8. Motion for New Trial, filed with the Clerk of said Court of Appeals of Lucas County, Ohio, on June 22, 1932;

9. Bill of Exceptions, allowed by said Court of Appeals on June 23, 1932, and filed with the Clerk of the Supreme Court of Ohio on July 23, 1932; together with plaintiff's Exhibits 1, 2, 3, 3A, 3B, 3C, 4 and 6 to 11, inclusive, and defendant's Exhibits 1 to 4, inclusive. Of the foregoing exhibits, the following to be shown only by reference to the same papers in preceding pages of transcript, viz:

Plaintiff's Exhibit 1 (Petition in case of Clara Seilcken-Schwarz, plaintiff, v. The Woolson Spice Company, et al., defendants) by incorporating, by reference, the same paper which is attached as Exhibit A to the Pleading (referred [fol.29] to in paragraph numbered 5 of this stipulation) bearing the title "Amendment to Petition for Writ of Habeas Corpus"; Plaintiff's Exhibit 3C (order of attachment of John W. Koehrman) and 8 (subpœna duces tecum on said John W. Koehrman) by incorporating, by reference, the same papers which are attached as Exhibits to the Pleading (referred to in paragraph numbered 4 of this stipulation) bearing the title "Petition for Writ of Habeas Corpus"; of the foregoing Exhibits the following to be indicated only by title as follows, viz: Plaintiff's Exhibit 3A (Notary's Order of Commitment for C. N. Bevan); Plaintiff's Exhibit 3B (Notary's Writ of Attachment of Robert A. Stranahan); Plaintiff's Exhibit 7 (Subpœna Duces Tecum served upon C. N. Bevan); Plaintiff's Exhibit 9 (Subpœna served upon Robert A. Stranahan); Plaintiff's Exhibit 10 (Notary's Writ of Attachment of Robert A. Stranahan); Plaintiff's Exhibit 11 (Opinion of the Court of Appeals of New York in the case of George C. Harrington, Administrator, v. Eugene M. Keteltas, 92 N. Y. 40); of the foregoing Plaintiff's Exhibit 4 and Defendants' Exhibits 2 and 3 shall be abbreviated in accordance with the typewritten copies thereof submitted to you by counsel;

10. Opinion of the Court of Appeals of Lucas County, Ohio, in this cause;

11. Journal Entry filed in Supreme Court of Ohio on August 24, 1932, substituting Gilson D. Light, as Sheriff of Lucas County, Ohio, as defendant-in-error;

12. Motion for Stay of Execution and Advancement of Cause, filed in Supreme Court of Ohio, on October 15, 1932, and notice of hearing;

13. Order of Supreme Court of Ohio, entered on or about October 26, 1932, granting stay of execution;

14. Supersedeas bond filed in Supreme Court of Ohio on November 25, 1932;

15. Judgment of the Supreme Court of Ohio filed on January 25, 1933;

16. Opinion of Supreme Court of Ohio in this cause;

[fol. 30] 17. Order of Supreme Court of Ohio substituting David M. Krieger as Sheriff of Lucas County, Ohio, as defendant-in-error nunc pro tunc, filed February 10, 1933;

18. Appellant's petition for appeal, filed herein on February 10, 1933;

19. Appellant's assignment of errors, filed herein on February 10, 1933;

20. Appellant's statement as to the basis on which he contends that the Supreme Court of the United States has jurisdiction on appeal to review the said judgment of the Supreme Court of Ohio, filed herein on February 10, 1933;

21. Order allowing appeal and supersedeas, filed herein on February 10, 1933;

22. Appeal and supersedeas bond approved and filed herein on February 17, 1933;

23. Statement to respondent-appellee (defendant-in-error in the Supreme Court of Ohio) re Paragraph 3, Rule 12, of the Supreme Court of the United States, and acknowledgment of service thereof, filed herein on February 10, 1933;

24. Citation upon appeal and proof of service, filed herein on February 16, 1933;

25. Stipulation as to Transcript of Record on Appeal;

26. Appellee's Statement making against the jurisdiction asserted by the appellant, filed herein on February 24, 1933;

27. Clerk's certificate.

Said transcript to be prepared as required by law and the rules of the Supreme Court of the United States and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 22nd day of March, 1933, pursuant to the order allowing said appeal.

[fol. 31] It is further stipulated by and between the parties that the foregoing items constitute all portions of the record necessary for a determination of the questions raised on this appeal and that no portion of the record omitted is necessary or material for a determination of such questions.

Dated March 2, 1933.

Geo. D. Welles, Cramp Davis, Attorneys for Appellant. Stuart Chase, H. S. Bugbee, Thomas J. Lynch, of Counsel. Baxter, Hostetler, Sidlo & Patterson, Fraser, Hett, Wall & Eppler, Attorneys for Appellee, Newton D. Baker, Harold W. Fraser, Raymond T. Jackson, John C. Morley, of Counsel.

[fols. 32-59] [File endorsement omitted.]

[fols. 60 & 61] Supersedeas bond on appeal for $1,000, approved and filed February 17, 1933, omitted in printing.

[fol. 62] IN SUPREME COURT OF OHIO

[Title omitted]

PETITION IN ERROR—Filed June 24, 1932

John W. Koehrman, plaintiff-in-error (hereinafter referred to as the petitioner) says that at the May Term, 1932, of the Court of Appeals of Lucas County, Ohio, on June —, 1932, in an action for a writ of habeas corpus which originated and was therein pending, being Cause No. 2692, entitled "Ex Parte, John W. Koehrman", and in which plaintiff-in-error was petitioner and Joseph Zimmerman, as Sheriff of Lucas County, Ohio, was respondent, a judgment was rendered against the petitioner.

Said case originated in said Court of Appeals and involved questions arising under the Constitution of the United States and the Constitution of Ohio.

A transcript of the docket and journal entries and the original papers in said court are filed herewith.

There is substantial error in said record, proceedings and judgment, to the manifest prejudice of petitioner, in the following and other respects:

(1) Said Court of Appeals erred in not finding and adjudging that petitioner was unlawfully deprived of his liberty, and in not discharging him.

(2) Said Court of Appeals erred in re-committing and remanding petitioner to the custody of the respondent.

(3) The finding, decision and judgment of said Court of Appeals are contrary to law.

[fol. 63] (4) The finding, decision and judgment of said Court of Appeals are not sustained by sufficient evidence.

(5) The finding, decision and judgment of the Court of Appeals are erroneous, in that there is no evidence to sustain them.

(6) Said Court of Appeals erred in not finding and adjudging that the order of attachment under which petitioner was imprisoned by the respondent was void and of no effect.

(7) Said Court of Appeals erred in not finding and adjudging that the petition of the plaintiff in the case in which it was attempted to take said depositions, viz: Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio; entitled Clara Sielcken-Schwarz, plaintiff, v. The Woolson Spice Company, et al., defendants, stated no cause of action whatever and tendered no issue whatever and that no testimony which petitioner could give and no books, papers or documents which petitioner could produce would be relevant or material to any issue whatever under said alleged petition or in said alleged action and that therefore the action of the notary public in attempting to adjudge that petitioner was in contempt and in issuing an attachment for petitioner and bringing about his arrest and detention violated the provisions of Section 1 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States, and were illegal, null and void.

(8) Said Court of Appeals erred in not finding and adjudging that the petition of the plaintiff in said Case No. 131,925 in the Court of Common Pleas of Lucas County, Ohio, in which it was attempted to take said depositions, affirmatively showed that said plaintiff had no capacity or right whatever to bring or prosecute said action or to take any depositions at all therein or to enforce the attendance or testimony of any witnesses or the production of any books, papers or documents, and that therefore the action of the notary public in attempting to adjudge that peti- [fol. 64] tioner was in contempt and in issuing an attachment for petitioner and bringing about his arrest and detention violated the provisions of Section 1 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States and were illegal, null and void.

(9) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in

this case, are in conflict with and violate the provisions of Section 1 of Article I of the Constitution of the State of Ohio and are null and void, in that they deprive the petitioner of his liberty and property, contravening that part of Section 1 of Article I, which provides that all men "have certain inalienable rights, among which are those of enjoying and defending liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety."

(10) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case are in conflict with and violate the provisions of Section 14 of Article I of the Constitution of Ohio, and are null and void, in that they deprive the petitioner of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of Section 14 of Article I, which provides that the "right of the people to be secure in their persons, houses, papers and possessions against unreasonable searches and seizures shall not be violated."

(11) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Sections 5, 10 and 16 of Article I and Section 32 of Article II of the Constitution of Ohio, and are null and void.

[fol. 65] (12) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of said sections as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article IV of the Constitution of Ohio, in that they attempt to confer judicial power on notaries public.

(13) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such

sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, and were null and void, in that they deprive the petitioner of his liberty and property without due process of law; contravening that part of Section 1 of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

(14) Said Court of Appeals erred in not finding and adjudging that said notary public had no jurisdiction to attempt to take said depositions or to force or require petitioner to attend as a witness or to produce any books, papers or documents or to adjudge petitioner in contempt for failing or refusing so to do, or to make or issue any order of attachment against this petitioner.

(15) Said Court of Appeals erred in not finding and adjudging that said notary public, in attempting to adjudge petitioner in contempt and in issuing an attachment for him, attempted to exercise judicial powers in violation of Section 1 of Article IV of the Constitution of Ohio, and that all of said acts of said notary were null and void.

(16) Said Court of Appeals erred in not finding and adjudging that the notary public purporting to act under said Sections 11510, 11511 and 11512 of the General Code of Ohio and attempting to adjudge the petitioner guilty of [fol. 66] contempt and issuing said order of attachment for his person, was disqualified on account of his personal pecuniary interest in the taking of said depositions so to adjudge and act and to cause any attachment to be issued against petitioner by reason of the fact that said notary public was employed and paid by the plaintiff in said alleged pending suit, the notary's judgment of contempt and attachment being made and issued at the request of said plaintiff and that his employment was upon such terms that its extent and continuance and his continued compensation was contingent upon procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and attachment and that therefore said notary's acts in so adjudging and bringing about petitioner's attachment and detention were a denial of due

process of law in violation of the Fourteenth Amendment to the Constitution of the United States of America and were null and void.

(17) Said Court of Appeals erred in not finding and adjudging that the attempted adjudication by the notary that the petitioner was in contempt and the issuance of an attachment against him in petitioner's absence and without notice to him or to his counsel and without an opportunity for him first to know the charges against him or to have a hearing thereon were in violation of petitioner's constitutional rights under Sections 1, 5, 10, 14 and 16 of Article I and Section 1 of Article IV of the Ohio Constitution and each of such sections and in violation of his rights under the Fourteenth Amendment of the Constitution of the United States and were null and void.

(18) Said Court of Appeals erred in not finding that the purported subpœna duces tecum issued by said notary was illegal and void, both on account of its general, vague and indefinite character and because it constituted an unreasonable search and seizure in violation of Section 14 of Article I of the Constitution of Ohio, and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

[fol. 67] (19) Said Court of Appeals erred in not finding and adjudging that the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, in which it was attempted to take said depositions was not entitled to take depositions nor did the notary public have power or jurisdiction to issue any subpœna requiring the attendance of any witness or issue any attachment for any witness for the reason that no service of summons had been made on one of the defendants in said action, viz: Marion M. Miller, nor had any service been made on the defendant Irving Trust Company in its capacity as Executor of the Estate of Hermann Sielcken, deceased.

(20) Said Court of Appeals erred in not finding and adjudging that the attempt of the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants, to take depositions in said case was not in good faith for the purpose of securing

or perpetuating any evidence material to any issue of said case or for use in the trial of said case or that it was not otherwise in good faith, but was an abuse of process.

(21) Said Court of Appeals erred in other respects apparent on the face of the record.

(22) Said Caurt of Appeals erred in overruling petitioner's motion for a new trial.

Wherefore petitioner prays that said judgment in the Court of Appeals be reversed and that he be restored to all things lost thereby.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Plaintiff-in-Error.

[fol. 68] IN SUPREME COURT OF OHIO

[Title omitted]

ENTRY OF APPEARANCE—Filed June 25, 1932

The undersigned defendant-in-errror and respondent waives the issuance and service of summons-in-error and enters his appearance herein.

Joseph Zimmerman, as Sheriff of Lucas County, Ohio. Fraser, Hiett, Wall & Effler, Counsel of Record for the Respondent in Court of Appeals.

6/24/32.

[fol. 69] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER SUBSTITUTING SHERIFF—Filed August 24, 1932

Upon the suggestion by counsel for the petitioner, and it appearing to the court, that during the pendency of these proceedings-in-error the respondent and defendant-in-error, Joseph Zimmerman, has ceased to be Sheriff of Lucas County, Ohio, and that Gilson D. Light has succeeded said Zimmerman in said office and is now the Sheriff of Lucas

County, Ohio, and with the consent of all parties, including said Gilson D. Light,

It is ordered and adjudged:

That said Gilson D. Light, as Sheriff of Lucas County, Ohio, is substituted as respondent and defendant-in-error herein in place of said Joseph Zimmerman, and that these proceedings-in-error proceed under their original title.

Approved.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Petitioner-Plaintiff-in-error. Baker, Hostetler, Sidlo & Patterson, Fraser, Hiett, Wall & Effler, Attorneys for Respondent-Defendant-in-error.

O. K. Gilson D. Light.

[fol. 70] IN SUPREME COURT OF OHIO

[Title omitted]

MOTION FOR STAY OF EXECUTION AND ADVANCEMENT OF CAUSE —Filed October 15, 1932

Now comes plaintiff-in-error, J. W. Koehrman, and moves the court for an order staying execution of the final judgment of the Court of Appeals of Lucas County, Ohio, to reverse which this proceeding-in-error is being prosecuted, until this proceeding-in-error shall have been heard and decided by this court, and to fix the terms of such stay of execution.

Plaintiff-in-error further moves the court that, in the event his motion for a stay of execution be not granted, this cause be advanced for hearing and decision by this court on a date prior to the 25th day of October, 1932.

The foregoing motion for stay of execution is made upon the grounds that the present proceeding, which is in habeas corpus, presents substantial and important questions for determination,

(a) As to the construction of Sections 11510, 11511 and 11512, General Code, and their constitutionality both in respect to the Constitution of the State of Ohio and the Fourteenth Amendment to the Constitution of the United States;

(b) As to the disqualification of the Notary Public to issue the orders of commitment and attachment;

(c) As to whether any evidence is or could be relevant or material, or the giving of it enforced at the instance of the plaintiff in an action which the plaintiff has no right or capacity to maintain and in which her petition states no cause of action;

(d) As to whether the plaintiff in said action, in the Common Pleas Court of Lucas County, Ohio, has any right or capacity to maintain said action and whether her petition states any cause of action, which questions are raised in said Common Pleas Court by a demurrer filed by one [fols. 71-74] of the defendants in said action, which demurrer is pending and set for hearing on October 27, 1932;

(e) Other and related questions, shown by the brief of plaintiff-in-error, which questions are of general interest and importance; and upon the further grounds appearing in the attached affidavit of plaintiff-in-error in support hereof.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Plaintiff-in-error.

[fol. 75] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER GRANTING MOTION BY PLAINTIFF IN ERROR FOR STAY OF EXECUTION AND ADVANCEMENT OF CAUSE—Oct. 26, 1932

It is ordered by the Court that this motion be, and the same hereby is, allowed.

Journal 33, page 29.

[fol. 76] Supersedeas bond on stay for $100.00, approved and filed November 25, 1932, omitted in printing.

[fol. 77] IN SUPREME COURT OF OHIO, OF THE TERM OF JANUARY A. D. 1933

No. 23653

Ex Parte JOHN W. KOEHRMAN

Error to the Court of Appeals of Lucas County

JUDGMENT—Jan. 25, 1933

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at $—.

Ordered that a special Mandate be sent to the Court of Appeals of Lucas County, to carry this judgment into execution.

Journal 33, page 90.

[fol. 78] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER SUBSTITUTING SHERIFF—Filed February 10, 1933

Upon the suggestion by counsel for the plaintiff-in-error, and it appearing to the Court, that during the pendency of these proceedings in error, viz., on January 1, 1933, defendant-in-error, Gilson D. Light, ceased to be Sheriff of Lucas County, Ohio, and that David M. Krieger has succeeded said Light in said office and is now Sheriff of Lucas County, Ohio.

It is ordered and adjudged:

That said David M. Krieger, as Sheriff of Lucas County, Ohio, is substituted nunc pro tunc as defendant-in-error herein in place of said Gilson D. Light.

Carl V. Weygandt, C. J.

[fol. 79] IN SUPREME COURT OF OHIO

Ex Parte BEVAN

Ex Parte KOEHRMAN

Ex Parte STRANAHAN

Evidence—Depositions—Judicial power not exercised by notary public committing witness for contempt—Constitutional law—Sections 11510, 11511 and 11512, General Code—Due process of law—Committed witness afforded statutory remedy—Section 11514, General Code—Relevancy or competency of testimony and privilege preserved in trial court—Right to cross-examine adverse party vests when summons served—Sections 11497 and 11526, General Code—Cross-examination authorized, although codefendant not served—Codefendant may be served, how—Section 11299, General Code—Infirmity of petition or action not ground for refusal to respond—Notary public not disqualified for interest in taking depositions—Subpœna duces tecum not unreasonable search and seizure—Entire corporate correspondence file, records and documents ordered produced—Collection of assets of corporation—Heir or legatee may maintain action, upon refusal of personal representative.

1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpœna.

2. The general assembly did not violate any provision of the federal or state constitution in the enactment of Sections 11510, 11511 and 11512, General Code, in delegating such power to notaries public. (DeCamp v. Archibald, 50 Ohio St., 618, and Benckenstein v. Schott, 92 Ohio St., 29, approved and followed.)

3. A witness committed by a notary public, under Sections 11510, 11511 and 11512, General Code, has his remedy under Section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross-examination

under the statute, the further right to test the relevancy or competency of the questions and to demand his privilege, is preserved to him in the trial court.

4. The right of a party to an action to examine the adverse party as upon cross-examination under Section 11497, General Code, vests as soon as summons is served on such party as provided by Section 11526, General Code. The fact that a co-defendant has not been served with summons, does not furnish any reason why the party served should not submit to such examination, since the party plaintiff may proceed under Section 11299, General Code.

[fol. 80] 5. No ground for refusal to appear before a notary public and testify, is afforded officers of a corporation by the fact that the petition in the action, in which it is sought to take the depositions of such officers as upon cross-examination, is claimed to be demurrable, or that the action was not brought within the time provided by law, or that a party plaintiff has been guilty of laches.

6. The claim that a notary public has such an interest in the taking of depositions as disqualifies him to act, is untenable, and the case of Tumey v. Ohio, 273 U. S., 510, has no application whatever.

7. In an action charging fraudulent conspiracy by the officers of a corporation, because of the tendency toward liberality in cases of this character, the range of the testimony is wide, and subpœnas duces tecum, which command that the entire correspondence file, records and documents of such corporation for many years back, be produced before the notary public by the officers of the corporation, to be used in connection with the giving of their depositions as upon cross-examination, are not so broad and sweeping as to be violative of due process, and do not constitute unreasonable searches and seizures.

8. When a personal representative of a decedent's estate refuses to bring an action for the collection of assets, an heir, legatee or devisee may bring the action and make such personal representative a party defendant.

Nos. 23652, 23653 and 23654

Decided January 25, 1933

Error to the Court of Appeals of Lucas County

OPINION

These are proceedings in error to review the respective judgments of the Court of Appeals of Lucas county, Ohio, made and entered in the above-entitled cases.

An intelligent consideration of the issues involved necessitates a comprehensive statement. In order to make it comprehensive, some time and much space have been consumed.

These judgments respectively deny original applications by the plaintiffs in error for discharge from the custody of the sheriff of Lucas county. The plaintiff in error C. N. Bevan was held under a commitment issued by a notary [fol. 81] public for his refusal to answer material questions, refusal to answer any further questions of any character, and refusal to produce material books or records, pursuant to a subpœna duces tecum, in the course of the taking of his deposition in the suit of Clara Sielcken-Schwarz v. The Woolson Spice Company et al., pending in the common pleas court of Lucas county. The plaintiffs in error John W. Koehrman and Robert A. Stranahan had respectively been arrested under attachments issued by the same notary, upon their refusal to appear and give their depositions in the same case, in response to subpœnas personally served upon them.

The material facts are as follows: On June 2, 1932, Clara Sielcken-Schwarz, as widow and sole residuary legatee of the late Hermann Sielcken, filed her petition in the common pleas court of Lucas county, Ohio, against the Woolson Spice Company, an Ohio corporation, of which the plaintiff in error, C. N. Bevan, is secretary and treasurer; against plaintiffs in error John W. Koehrmann and Robert A. Stranahan; against Franklin H. Biggs, Marion M. Miller and Frank D. Stranahan; against Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William Brigham, deceased; and against the Irving Trust Company, a foreign corporation, as executor of the last will and testament of Hermann Sielcken, deceased.

The petition charges that the defendants Koehrmann and Biggs and said Brigham fraudulently conspired together to take advantage of the absence in Germany of Sielcken (president and controlling stockholder of the Woolson Company), where he had gone on the business of the company, and where he had been detained by his last illness and the exigencies of the World War, to oust Sielcken as president, and to wrongfully acquire control of the corporation and manipulate and exploit it in their own interests; that thereafter said Koehrman, Biggs and Brigham, in as- [fol. 82] sociation with Robert A. Stranahan and Frank Stranahan, aided and abetted by the Woolson Spice Company, fraudulently conspired together to acquire for a grossly inadequate price the stock formerly held by Sielcken and then held by his estate; that the fraudulent conspiracy was carried on by such individual defendants taking advantage of the control of the corporation, wrongfully acquired by them, to misrepresent the financial condition, business and prospects of the Woolson Company; that such fraudulent misrepresentations were communicated to the executor, and to all prospective purchasers of the stock; and that as a result of this wrongful and fraudulent conspiracy the individual defendants, aided and abetted by the Woolson Spice Company, obtained the stock of the Sielcken estate for a grossly inadequate price.

The petition asks to have the stock so obtained restored to the estate, together with all dividends paid thereon since its fraudulent conversion.

The petition alleges that the fraud was not discovered by the plaintiff, sole residuary legatee, until 1931, and was not discovered by the executor prior to that time. The petition further sets forth that since the executor has failed and refused to bring the suit on request of the plaintiff, such executor is therefore joined as a party defendant.

On the same day the petition was filed, summons was duly issued and served upon all of the defendants except Marion M. Miller, who could not be found within the county and who has not been served. On the same day, after service of summons, notice to take depositions on June 6, 1932, was served on the common pleas defendants, and subpœnas duces tecum were served on the witnesses, Koehrman and Bevan. No proceedings were had on this notice because

prior to June 6th counsel for the common pleas plaintiff were served with a motion to quash the notice to take depositions and the subpœnas duces tecum, and to enjoin the [fol. 83] taking of depositions. This motion came on for hearing before the common pleas court of Lucas County, Ohio, on June 6, 1932, and, at the suggestion of the court, an agreement was reached between counsel for the common pleas plaintiff and chief counsel for the common pleas defendants, and for these plaintiffs in error, that the taking of depositions should be postponed until June 13th. Pursuant to that agreement new notices to take depositions on June 13th were served on the common pleas defendants, subpœnas duces tecum upon the plaintiffs in error Bevan and Koehrman, and ordinary subpœnas upon the plaintiff in error Robert A. Stranahan and upon Frank Stranahan.

At 9:30 a. m., on June 13th, the hour fixed for taking the depositions, the witness Bevan appeared, but without any of the books and papers called for in his subpœna. The witnesses Koehrman and Stranahan disregarded their subpœnas and failed to appear. On the failure of three of the witnesses summoned to appear, and the failure of the witness, Bevan, to make any compliance with his subpœna duces tecum, the notary adjourned the hearing until 2 p. m., of the same day, and ordered Bevan to produce at that time the books and records described in his subpœna. Prior to this adjourned time for the taking of these depositions a supplemental motion to quash the new notices and subpœnas, and to enjoin the taking of depositions in the common pleas suit was filed in the common pleas court. At 2 p. m., on June 13th, being the time to which the taking of the depositions had been adjourned, Koehrman and Stranahan again failed to appear. Bevan appeared and was duly sworn and proceeded to answer a few questions as to his name and occupation. He was then asked a series of questions, subsequently found to be material by the Court of Appeals for Lucas county, Ohio, and in each instance, upon being ordered to answer by the notary, he refused to do so, making no claim of privilege, and giving as his only [fol. 84] reason that he was advised by counsel not to answer. Bevan also refused to produce any of the books, records or documents required by his subpœna duces tecum. Finally Bevan stated that he would answer no further

questions of any kind or character whatsoever, and he again refused to produce any of the books, records or documents described in his subpœna duces tecum.

Thereupon the notary adjudged that said questions were material, and that said books, papers and documents were material and properly described, and issued to the sheriff of Lucas county, Ohio, a commitment directing him to arrest and commit the said witness to the county jail until he should testify. The witnesses Koehrman and Stranahan having failed and refused to appear in obedience to their subpœnas, the notary issued writs of attachment for each of them, commanding the sheriff of Lucas county, Ohio, to attach each of them and bring them before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpœna as to give his testimony in the action."

No arrests were made under the commitment or writs until 9:10 a. m., on June 14th, at which time the sheriff's office was advised by counsel for the plaintiffs in error that Bevan, Koehrman and Robert A. Stranahan were then in the Lucas county courthouse, ready to be arrested. A technical arrest was then made, and three applications for discharge from illegal imprisonment or petitions for writs of habeas corpus were immediately filed with the Court of Appeals of Lucas county, Ohio. The applications or writs were granted at once, before the sheriff had an opportunity to produce the witnesses Koehrman and Stranahan before the notary, and all were immediately released on their own recognizances, pending hearings on their applications or petitions.

Thereupon counsel for the plaintiffs in error and common [fol. 85] pleas defendants dismissed without prejudice, and without any hearing, the motion and supplemental motion to enjoin the taking of depositions in the suit which had been filed in the common pleas court.

On the morning of June 15, 1932, the plaintiffs in error filed in the Court of Appeals of Lucas county, Ohio, amendments to their respective applications or petitions, in which they raised the constitutional questions now sought to be brought before this court.

The original applications or petitions, and the amended applications or petitions, were heard by the Court of Ap-

peals of Lucas county on June 15th and 16th, and after hearing all evidence offered by counsel on the legality of the restraint of the respective witnesses, lengthy arguments of counsel, and the submission of briefs, that court on June 21, 1932, held that the common pleas plaintiff was entitled to take the depositions of these witnesses at once; that the subpœnas duces tecum called for material, books and papers, and were not too broad; that the questions asked the witness Bevan were material; that he was guilty of contempt for refusing to produce the books and papers; and that the witnesses Koehrman and Stranahan were legally attached for disobeying their subpœnas.

On June 22d the Court of Appeals for Lucas county, Ohio, ordered the applications dismissed and the applicants remanded to the custody of the sheriff of Lucas county. On the same day motions for a new trial in the Court of Appeals of Lucas county were overruled. Petitions in error were at once filed in this court by plaintiffs in error, and on June 25th respective applications for stays of execution were addressed to Judge Kinkade of this court. After a full hearing, Judge Kinkade overruled the applications. Similar applications were presented to the Court of Appeals of Lucas county on June 27th, and on [fol. 86] June 29th these applications for stays were likewise overruled by that court.

Messrs. Tracy, Chapman & Welles, Messrs. Marshall, Melhorn, Marlar & Martin, Mr. Harry S. Bugbee, Mr. Stuart S. Wall, Mr. Crary Davis and Mr. Thomas J. Lynch for plaintiffs in error.

Messrs. Baker, Hostetler, Sidlo & Patterson and Messrs. Fraser, Hiett, Wall & Effler for defendant in error.

STEPHENSON, J.:

These three cases were consolidated and submitted together, as the same alleged controlling questions arise in each case. There will be no further statement of fact in this opinion, other than is absolutely necessary in order to apply the law, as the court interprets it.

It is assumed that the depositions in question were being taken before a regularly appointed notary public in pursuance of notice as provided by statute, as no question was raised along these lines.

Stranahan was served with an ordinary subpœna, and Bevan and Koehrman were served with subpœnas duces tecum.

No complaint is made as to the service of the subpœnas. It is contended that the subpœnas duces tecum "were so broad and sweeping in their terms as to be violative of due process and to constitute unreasonable searches, and seizures, in addition to calling for incompetent and immaterial evidence."

As bearing upon this particular phase of the case, it is significant that no question of privilege was raised.

Stranahan and Koehrman disobeyed the order of their subpœnas and failed to appear. Bevan appeared, was sworn, answered the preliminary questions as to name and residence, refused to answer further questions, and refused to produce any of the books, records and documents described in his subpœna duces tecum, giving as his reason [fol. 87] therefor that he "was acting upon the advice of counsel," which, of itself, in a case of this character, is no reason at all. Attachments were issued and served on Stranahan and Koehrman. Brushing aside the preliminary proceedings, all three of them were arrested and committed to jail until they "should testify." Thereupon applications were made to the Court of Appeals for their release. It would be of little moment whether the application was made under favor of Section 11514, General Code of Ohio, or whether it was in the form of habeas corpus, except that the United States Circuit Court of Appeals of the Sixth Circuit has held substantially that this statute provides a method for judicial review of the action of the notary. Bevan v. Light, Sheriff (C. C. A.), 61 F. (2d) 1019.

The Court of Appeals heard the applications of all three, dismissed their petitions and they were thereupon automatically remanded to the custody of the sheriff of Lucas county; and this court is asked, in this proceeding, to reverse the Court of Appeals and discharge plaintiffs in error from custody.

Practically all the statutes empowering notaries public to take depositions and commit any one violating their lawful orders are attacked.

The administration of justice would be seriously impeded had not the General Assembly made some provision for the taking of depositions. As a part of the instrumentality for

taking depositions, the Legislature created the office of notary public and made it appointive. There was reason for this enactment. A notary public, above all officers, should not be under any obligation to the electorate of his county. A notary public is appointed by the Governor, on the certificate of the common pleas judge of the county for which he is appointed, which judge must have personal knowledge of his good moral character and his ability to [fol. 88] perform the duties of the office, or ascertain same by an examination prescribed by the rules of court.

No requirement as to fitness is required of a justice of the peace. If the individual who is a candidate for the office of justice of the peace in his township secures the greater number of votes, he is justice of the peace, regardless of fitness, and he is a judicial officer with power to "hear and determine," and undoubtedly with power to commit for contempt of his court.

Can it be said that the Legislature has no authority to delegate the power to commit to a notary public, notwithstanding his fitness, just because he has no power to "hear and determine?"

Our forebears, with uncanny wisdom, gave us the legislative, executive and judicial functions of government, and intended that they should operate as "checks and balances." During our formative period, the courts, federal and state, viewed with jealousy any attempt on the part of Congress or a state Legislature to delegate the powers inherent in one branch of government to another. Our rapid expansion made necessary the creation of many new offices and they were created, probably too many of them; but had not the courts relaxed to some extent the rule requiring the powers of government to be kept sacredly separate, we would have had many more of them.

It would not be necessary to go beyond the confines of Ohio to find scores of instances wherein one branch of government has been invested with the powers of another. This departure had to be made as a matter of public exigency.

A notary public is a ministerial officer, as that term has been understood so long that "the memory of man runneth not to the contrary." Some worth-while authorities insist that the word "ministerial" means nothing, as applied to

an officer—that our officers are legislative, executive and judicial. Under this strict nomenclature we must hold that [fol. 89] a notary public is an executive officer, clothed with such power as the Legislature, within its constitutional limitations, saw fit to delegate to him.

Is the power to commit, delegated to notaries public, a judicial function? We think not. It is so circumscribed by legislative enactment that there is little room remaining within which to exercise the only judicial function, if it by any stretch of the imagination could be called a judicial function, whether he will or will not commit.

That is not all. We are not so sure that the section under which commitment by a notary is authorized is not a mandatory statute, notwithstanding the language used is directory.

Section 11512, General Code, provides that the notary "may fine" or "may imprison" for disobedience of the order of a subpœna or for refusal to testify. While language is helpful in determining whether a statute is mandatory or directory, it is by no means conclusive. The true test is the legislative intent. What is the purpose of the statute? What did the Legislature intend that it should accomplish?

The purpose of depositions is threefold: First, to obtain the testimony of witnesses beyond the jurisdiction of the court; second, to perpetuate testimony; and, third, to operate as a bill of discovery.

The Legislature evidently sought to provide a means whereby a litigant's rights would be preserved in a case the exigencies of which would prevent him from producing his testimony in court in the regular way; to compel the production of testimony that might be forever lost; and to afford an opportunity to the litigant to secure evidence of facts necessary to make out his case, which evidence was peculiarly within the knowledge, or if documentary, in the possession and control of his adversary.

Under these enactments the litigant is entitled to these rights as a matter of law. He undertakes to assert them. [fol. 90] Notices are regularly served to take depositions of the officers of an adversary corporation. Subpœnas are regularly served. One officer appears in obedience to his

subpœna, and refuses to testify. Two other officers refuse to appear. The litigant requests the notary to fine or commit the recalcitrant witnesses under such circumstances, and the notary flatly refuses to either fine or commit—must the litigant stop here and proceed anew before another notary or can he not resort to a court of record and by mandamus compel the notary to do his duty?

The witness is given the right to have the assessment of his fine or his commitment inquired into by a court of competent jurisdiction. Is the door of the law closed to the litigant?

We are not holding Section 11512, General Code, to be a mandatory statute, as it is not necessary so to do in this case.

The plaintiff in the action in which it was sought to take these depositions was not at all modest in her demands. The subpœnas duces tecum did call for the production of a mass of testimony, but it must be remembered that this is an action alleging fraudulent conspiracy, and, from the allegations of the petition, the range of the testimony was necessarily large.

The allegations of this petition are sufficient to authorize an inspection of all records, documents and correspondence of the Woolson Spice Company from the time Hermann Sielcken became connected with the corporation until his death. This would include evidence of inducement whereby he was encouraged to connect himself with the corporation, if such evidence existed, as well as evidentiary matter since his death that lent light to the alleged fraudulent transactions during his lifetime.

In the absence of any question of privilege, we do not regard the scope of these subpœnas as unreasonably com-[fol. 91] prehensive, or that they constitute unlawful search and seizure.

Clara Sielcken Schwarz as widow and sole residuary legatee of Hermann Sielcken, deceased, upon the refusal of his personal representative to institute the action, had full right and capacity to file and maintain the action brought by her. To hold otherwise would be to place heirs, legatees and devisees at the mercy of capricious administrators, executors and trustees. On this proposition we are content with the authorities cited by the learned Court of Appeals

which heard the case: 24 Corpus Juris, 797, Section 1981; 11 Ruling Case Law, 262, Section 297; 22 L. R. A. (N. S.), 458, note; and 20 Ann. Cas., 96.

Whether the petition is demurrable, or the action is barred by the statute of limitations, or Clara Sielcken Schwarz should not prevail in her suit because of laches, furnish no plausible pretext, and certainly no defense to Bevan, Koehrman and Stranahan for the disobedience of the orders of their subpœnas, in the face of Section 11526, General Code, which provides, in substance, that depositions may be taken at any time after the service of summons.

The right to examine these relators, either orally or by deposition, as upon cross-examination, is statutory, and its exercise does not necessarily constitute a "fishing expedition." Neither of these sections is in contravention of the federal or state Constitutions.

The fact that all parties defendant were not served with summons when their depositions were sought to be taken can make no difference so far as the relators are concerned, if they have been so served.

The contention that the notary who committed the relators was disqualified because of interest is not tenable, and does not come within the purview of Tumey v. Ohio, 273 U. S., 510, 47 S. Ct., 437, 71 L. Ed., 749, 50 A. L. R., 1243.

The review of the action of the notary in committing [fol. 92] relators as provided by Section 11514, General Code, afforded them due process. In addition, the right and opportunity to object to any and all testimony taken by the notary, as being irrelevant, incompetent, or privileged, was preserved to them in the trial court, and they had due process of law.

It has been heretofore held by this court that a notary public, in committing a witness to jail for refusing to answer questions, and in issuing an attachment for a witness who disobeys the order of his subpœna, does not exercise judicial power, and we see no good reason why we should depart from this long-established rule: De Camp v. Archibald, 50 Ohio St., 618, 35 N. E., 1056, 40 Am. St. Rep., 692; Benckenstein v. Schott, Sheriff, 92 Ohio St., 29, 110 N. E., 633.

These cases are likewise sufficient answer to the claim that Sections 11510, 11511 and 11512, General Code, are violative of the state and federal constitutions in denying due process of law.

We find no prejudicial error in the record of any of these cases, and the judgment of the Court of Appeals in each and all of them is affirmed.

Judgments affirmed.

Day, Allen, Jones and Matthias, JJ., concur.
Weygandt, C. J., and Kinkade, J., not participating.

[fol. 93] Reporter's certificate to foregoing paper omitted in printing.

[fol. 94] In Court of Appeals of Lucas County

Appearance Docket No. 6, Page 192

C. A. No. 2692

Ex Parte John W. Koehrman

Marshall, Melhorn, Marlar & Martin; Tracy, Chapman & Welles.

Docket Entries—Filed in Supreme Court of Ohio July 23, 1932

1932.

June 14. Petition for Writ of Habeas Corpus filed.

June 14. Writ of Habeas Corpus granted. Bond fixed at $100.00. Jour. 7-276.

June 14. Præcipe filed. Writ of Habeas issued and delivered Sheriff.

June 15. Writ of Habeas Corpus filed endorsed as follows, viz: Received this writ June 14, 1932 at 10:45 a. m. and pursuant to its command I do now have this 15th day of June, 1932 at 9:30 a. m. the body of John W. Koehrman before the Court of Appeals of Lucas County, Ohio.

I certify that the cause and reason for my having the said John W. Koehrman in custody arises from and is because of a writ and commitment

papers issued and delivered to me by William Purcell, Notary Public, Lucas County, Ohio, which said writ and commitment papers I hereto attach and make a part hereof as completely as though fully rewritten herein.

Joseph Zimmerman, Sheriff, by Rolland Staggemeier, Deputy. .91.

June 15. Amendment to Petition for Writ of Habeas Corpus filed.

June 17. Recognizance filed.

June 22. Petition of Petitioner dismissed. Petitioner John W. Koehrman remanded to custody of Joseph Zimmerman, Sheriff. Petitioner to pay costs. Petitioner excepts. Jour. 7-285.

June 22. Motion for New Trial filed.

June 22. Above motion overruled. Petitioner excepts and is given leave to file Bill of Exceptions. Jour. 7-286.

June 23. Bill of Exceptions of Petitioner filed.

June 23. Time waived; Bill of Exceptions presented to the Court of Appeals.

[fol. 95]

June 23. Bill of Exceptions returned by Court of Appeals.

June 27. Motion to stay execution of Judgment and order filed.

June 29. Above motion denied. Petitioner excepts. Jour. 7-292.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 96] In Court of Appeals of Lucas County, Ohio

Journal Entries

At a term of the above named court begun and held before the Hon. Harry W. Lloyd, Hon. Silas S. Richards, Hon. Roy H. Williams, presiding judges, on the 16th day of May, A. D. 1932, among other proceedings had by and before said Court on the 14th day of June, A. D. 1932, being the 25th day of said term, as appears by its Journal of that day, were the following, viz.:

C. A. No. 2692

Ex Parte John W. Koehrman

On the application of John W. Koehrman, upon his filing the petition herein, a writ of habeas corpus is hereby granted as prayed for in said petition, returnable at 9:30 a. m., Wednesday, June 15, 1932. Bond is fixed in the sum of $100.00 personal cognizance.

Court of Appeals, by Harry W. Lloyd, Presiding Judge.

In Court of Appeals of Lucas County

C. A. No. 2692

Ex Parte John W. Koehrman

Judgment—June 22, 1932

Now came the Respondent herein, Joseph Zimmerman, Sheriff of the County of Lucas and State of Ohio, and made return of the writ of habeas corpus heretofore issued in this case, and also brought the body of the said John W. Koehrmann, petitioner herein.

Whereupon, the court having heard and considered the evidence offered by the petitioner and the respondent, the arguments of counsel and being fully advised in the premises, finds that the said John W. Koehrman is lawfully detained and imprisoned by the said Joseph Zimmerman, Sheriff of Lucas County, Ohio.

It is, therefore, ordered, adjudged and decreed that the [fol. 97] petition of the said petitioner, John W. Koehrman, be and the same hereby is dismissed, and he is remanded to the custody of the said Joseph Zimmerman, Sheriff of Lucas County, Ohio; and it is further ordered that the said petitioner pay the costs of this proceeding.

To all of which orders, judgments and decrees of the court the said petitioner, John W. Koehrman excepts.

On the 22nd day of June, 1932, being the 32nd day of the May Term, A. D. 1932, an Order in said cause was made, an entry of which appears on the Journal of said Court, in the words and figures as follows, to-wit:

C. A. No. 2692

Ex Parte John W. Koehrman

This cause came on to be heard on the petitioner's motion for a new trial and was submitted to the court. Upon consideration thereof the court finds that said motion is not well taken and the same ought to be and hereby is overruled; to which action and order of the court the petitioner objects and excepts, and upon his application is given leave to prepare and file a bill of exceptions herein.

On the 29th day of June, 1932, being the 38th day of the May Term, A. D. 1932, an Order in said cause was made, an entry of which appears on the Journal of said Court, in the words and figures as follows, to-wit:

C. A. No. 2692

Ex Parte John W. Koehrman

The petitioner's motion for an order suspending and staying execution of the judgment of this court discharging the writ of habeas corpus and remanding him to the custody of the Sheriff of Lucas County and dismissing his petition, having this day come on for hearing, the Court finds that said motion is not well taken and that it should be and the same is hereby denied.

To all of which petitioner excepts.

[fol. 98] No other Judgments or Decrees were rendered or Orders or Journal Entries made in said cause, as appears upon the Journal of said Court.

In testimony whereof I hereunto subscribe my name and affix the Seal of said Court at Toledo, Ohio, this 29th day of June A. D. 1932.

Geo. E. Hardy, Clerk, (Signed) by Gladys Hirschy, Deputy. (Seal.)

The State of Ohio,
Lucas County, ss:

I, Geo. E. Hardy, Clerk of the Common Pleas and Courts of Appeal within and for the County of Lucas and State of Ohio, do hereby certify that the above foregoing Exhibits

numbered 1 to 10 inclusive, contain all the original Pleadings, Process Papers and Records, and a full and true Transcript of all the Docket and Journal Entries in said cause and proceeding in said Court and in the Court of Common Pleas of said County, in cause No. 2692 C. A. Ex Parte John W. Koehrman.

In testimony whereof I hereunto subscribe my name and affix the Seal of said Court at Toledo, Ohio, this 29th day of June, A. D. 1932.

Geo. E. Hardy, Clerk, (Signed) by Gladys Hirschy, Deputy. (Seal.)

[fol. 99] In Court of Appeals of Lucas County, Ohio

C. A. No. 2692

Ex Parte John W. Koehrman

Petition for Writ of Habeas Corpus—Filed June 14, 1932

Your Petitioner, John W. Koehrman, respectfully represents he is unlawfully imprisoned and restrained of his liberty by Joseph Zimmerman, Sheriff of Lucas County, Ohio, in the County Jail of said County, without any legal authority, but under color of a pretended attachment issued by one William Purcell, styling himself a Notary Public in and for the County of Lucas, State of Ohio, a copy of which alleged attachment is attached hereto.

Your petitioner further says that no questions could have been asked him in the pretended taking of his deposition referred to in said attachment, calling for answers or production of any books, papers and records which were relevant or material to any issue in said cause of Sielcken-Schwarz vs. The Woolson Spice Company, et al., #131925 in the Common Pleas Court of Lucas County; that in fact, as your petitioner is advised, the petition in the cause in which it was attempted to take said deposition is demurrable because it does not state facts sufficient to constitute a cause of action, because the plaintiff has not legal capacity to sue and for other reasons, and, as hereinafter set forth, a demurrer on said grounds and other grounds is now in fact pending in the Court of Common Pleas of Lucas County, Ohio; that the subpœna which

was served on your petitioner purporting to require him to appear before a notary public and to produce books, papers and records (a copy of which subpœna is hereto attached) was illegal and void and called for the production of books, papers and records, without any adequate or definite description thereof or any designation of which thereof plaintiff claims to be relevant or material in said action; that petitioner is informed and believes and therefore avers that proper notice of the taking of said pretended deposition, such as to make it admissible in evidence on the trial of this cause, has not been made in that service of such notice [fol. 100] has not been made upon all of the defendants in said cause, and in that summons has not been served upon all of the defendants in said cause and cannot be served upon The Irving Trust Company, as Executor, one of said defendants; that petitioner is a resident of Lucas County, Ohio, in good health, and in every way capable of and expecting to appear at the trial of this cause in the Court of Common Pleas of Lucas County, Ohio, if called as a witness.

Petitioner further avers that the subpœna duces tecum served upon him, as aforesaid, constitutes an attempted unreasonable search and seizure such as is forbidden by the Constitution of the State of Ohio, including Section 14 of Article I thereof, among others, and by the Fourteenth Amendment to the Constitution of the United States, and that William Purcell, the Notary Public, before whom said depositions were, according to said pretended notice, to be taken, has attempted to exercise judicial power in violation of Section 1 of Article IV of the Constitution of Ohio by issuing the warrant for the arrest of your petitioner under which petitioner is, as aforesaid, now unlawfully restrained of his liberty by the Sheriff of this County. Petitioner says that he has been deprived of his liberty without due process or course of law and in violation of Section 1 of Article IV, Section 14 of Article I and Section 16 of Article I of the Constitution of the State of Ohio and in violation of the Fourteenth Amendment to the Constitution of the United States.

Petitioner further says that one of the defendants in said cause did on the 11th day of June, 1932, file a demurrer to the petition therein upon the grounds, among others, that

plaintiff has not legal capacity to sue, and that the petition does not state facts showing a cause of action, and did on the said date file a brief in support of said demurrer, which said demurrer is pending in said Court of Common Pleas of Lucas County, Ohio, and certain of the defendants in said cause did, on or about the 4th day of June, 1932, file in said cause a motion to quash notice to take depositions and subpœnas duces tecum, and for an injunction, en- [fols. 101 & 102] joining and restraining plaintiff and her attorneys from taking depositions in said cause until such time, if any, as might be fixed by said Court of Common Pleas for so doing, which said motion and a supplement thereto praying for an injunction against the further taking of the aforesaid deposition, are now pending before said Court of Common Pleas. Said demurrer, motion and supplement to said motion have not been decided and no orders have been issued upon them.

Petitioner is advised and says that said demurrer, motion and supplement to said motion, are well taken and should be sustained and granted.

Petitioner further says upon information and belief that plaintiff was not in good faith in attempting to take his testimony, as aforesaid, and that it was not the intention of plaintiff or her expectation that said testimony should be transcribed or used in the trial of said cause, except for the purpose of endeavoring to learn and ascertain facts and information to which plaintiff is not lawfully entitled, and for the purpose of endeavoring to learn and ascertain the means by which certain of the defendants in said cause expected and intended to establish their defenses to the alleged claims asserted by plaintiff in her petition against said defendants.

Wherefore petitioner prays that a writ of habeas corpus be issued to the said Joseph Zimmerman, Sheriff of Lucas County, Ohio, and that petitioner be discharged from said imprisonment and restraint of his liberty.

Marshall, Melhorn, Marlar & Martin, Tracy, Chapman & Welles, Attorneys for Petitioner.

Duly sworn to by John W. Koehrman. Jurat omitted in printing.

[fol. 103] In Common Pleas Court of Lucas County, Ohio

No. 131925

Clara Sielcken Schwarz, Plaintiff,

vs.

The Woolson Spice Company, et al., Defendants

Subpœna Duces Tecum

John W. Koehrman, The Woolson Spice Company, Summit Street, Toledo, Ohio:

You are hereby commanded to appear before the undersigned, a Notary Public within and for the County of Lucas, State of Ohio, at the office of Fraser, Hiett, Wall and Effler, Seventh Floor of the Home Bank Building, Toledo, Ohio, at nine thirty o'clock A. M. on Monday, June 13, 1932, and then and there give evidence as a witness on behalf of the plaintiff in the above entitled action; and you will, at that time and place, produce and have with you the following papers and documents:

1. All contracts and copies of contracts at any time entered into by you for the purchase or sale of any corporate stock of The Woolson Spice Company.

2. All records of any and all receipts by you of stock or cash dividends from The Woolson Spice Company during the year 1916 and since that date.

3. Any and all books, records and papers showing any division or distribution by you of any stock or cash dividends received by you from The Woolson Spice Company.

4. Any and all correspondence had by you with Hermann Sielcken and/or Crossman Sielcken of New York, N. Y., from 1895 to and including 1918.

5. All correspondence and copies of correspondence had by you with The Columbia Trust Company, New York, N. Y. and/or its successors, and/or any of its officers, agents and directors, including George E. Warren and Willard V. King, New York, N. Y. from 1916 to 1932 inclusive.

[fol. 104] 6. Any and all correspondence and copies of correspondence with The Alien Property Custodian, Washington, D. C., and/or any of the deputies, attorneys or agents of said The Alien Property Custodian of Washington, D. C. and New York, N. Y. from October 6, 1917 to date referring to the management of The Woolson Spice Company, the disposition of any and all of the stock of The Woolson Spice Company described in the petition filed herein, and/or Hermann Sielcken or his estate.

7. Any and all correspondence and copies of correspondence with Arthur Young & Company, New York, N. Y., and/or any of the members of said firm, their officers and agents of New York, N. Y., including Arthur Young, D. D. McKenzie and A. Vander Sommen, from the year 1916 to 1932 inclusive, referring to any audit, appraisal or examination of the books, records, affairs and/or stocks of The Woolson Spice Company during said period.

8. Any and all correspondence and copies of correspondence with William A. Brigham, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan, Robert A. Stranahan, Thorlief Nielsen, John S. Sorenson, Sorenson & Nielsen, The Woolson Spice Company and S. P. Jermain, from 1916 to 1932 inclusive, touching any of the business matters or affairs of The Woolson Spice Company, Hermann Sielcken, the estate of Hermann Sielcken, or any of the matters mentioned in the petition filed herein.

Hereof fail not under penalty of the law.

Given under my hand and seal at Toledo, Ohio, this 7th day of June, 1932.

William Purcell, Notary Public, Lucas County, Ohio.
William Purcell.

[fol. 105] In Court of Common Pleas of Lucas County, Ohio

No. 131925

Clara Sielcken Schwarz, Plaintiff,

vs.

The Woolson Spice Company, et al., Defendants

Notary's Order of Attachment

To the Sheriff of Lucas County, Ohio:

Whereas, in a certain action pending in the Common Pleas Court of Lucas County, Ohio, wherein Clara Sielcken Schwarz is plaintiff, and The Woolson Spice Company, et al., are defendants, the plaintiff filed with me a Notice to the defendants that it would, on the 13th day of June, 1932, take depositions of sundry witnesses at the office of Fraser, Hiett, Wall & Effler, 710 Home Bank Building, Toledo, in the County of Lucas, the State of Ohio, before me as Notary Public.

And, whereas, on the 7th day of June, 1932, at the request of the plaintiff, I issued a subpœna in said action whereby John W. Koehrman was commanded to appear before me, a Notary Public in and for the County of Lucas, Ohio, at the said office of Fraser, Hiett, Wall & Effler, Toledo, Ohio, there in on the 13th day of June, 1932, at 9:30 o'clock A. M., then and there to give evidence and the truth to say in a certain action wherein said Clara Sielcken Schwarz, is plaintiff, and The Woolson Spice Company, et al., are defendants.

And, whereas, said subpoena on the 7th day of June, 1932, was personally served on the said John W. Koehrman by myself, and fully appears by said return in the form of my affidavit endorsed thereon.

And, whereas, the said John W. Koehrman failed to attend, in obedience to said subpoena, as he was summoned to do.

You are therefore commanded to attach the said John W. Koehrman so as to have his body before me, William [fol. 106] Purcell, a Notary Public in and for Lucas County,

Ohio, at the said office of Fraser, Hiett, Wall & Effler, 710 Home Bank Building, Toledo, Ohio, forthwith, as well to answer the State of Ohio for said contempt in disobeying said subpœna, as to give his testimony in the action, in the recital of this writ mentioned, and have then and there this writ.

Given under my hand and official seal this 13th day of June, 1932.

(Signed) William Purcell, Notary Public, Lucas County, Ohio. (Seal.) (Rubber stamp) William Purcell.

[fol. 107] In Court of Appeals of Lucas County, Ohio

C. A. #2692

Ex Parte John W. Koehrman

Amendment to Petition for Writ of Habeas Corpus—Filed June 15, 1932

Now comes petitioner John W. Koehrman and by leave of court files this amendment to his petition for writ of habeas corpus herein and without waiving or in any extent abandoning any allegations in his orginal petition, alleges:

1. That a true copy of the petition in the cause of Clara Sielcken-Schwarz vs. The Woolson Spice Company, et al., No. 131925 in the Common Pleas Court of Lucas County, Ohio, referred to in petitioner's original petition herein, is hereto attached, marked "Exhibit A", and made a part hereof.

2. That for the reasons set forth in petitioner's original petition herein and for the additional reasons set forth in this amendment to said petition, William Purcell, the Notary Public by whose pretended order your petitioner was arrested and held by the Sheriff of Lucas County, Ohio, had no jurisdiction to take your petitioner's deposition in said cause, to issue a subpœna for your petitioner, to order your petitioner to answer any question or to make any order or issue any warrant for the arrest or imprisonment of your

petitioner until he submit to testify in the premises, or otherwise.

3. That said Notary Public, as shown by his order of attachment attaching your petitioner and causing petitioner to be brought before him, assumed and attempted to exercise judicial power.

[fol. 108] 4. Said Notary Public, William Purcell, was wholly disqualified to make an order for the attachment of your petitioner and to cause petitioner to be brought before him under penalty of being punished for contempt for disobeying said subpœna, for the reason that said Notary Public had been employed by counsel for plaintiff in said suit of Clara Sieleken-Schwarz vs. The Woolson Spice Company, et al., to act as notary and stenographer in the taking of the deposition of your petitioner and the transcribing thereof and that the amount of the compensation of said Notary Public for such service was dependent in large part, if not wholly, upon the number of pages of such testimony or evidence by way of exhibits which he might take and transcribe or copy; that it was to the pecuniary interest of said Notary Public that he should compel your petitioner to testify and produce books, papers and records before him so that such compensation might be earned by said Notary Public, and that said Notary Public was necessarily subject to the bias of his own personal pecuniary interest in determining whether or not an attachment should be issued for the bringing of petitioner before him to give his testimony in said action before said Notary Public, and for said reason said attachment was issued illegally and in violation of the Fourteenth Amendment of the Constitution of the United States.

5. That on the 14th day of June, 1932, after the Honorable Robert A. Gosline, Judge of the Court of Common Pleas of Lucas County, Ohio, before whom were pending the motions for injunctions, etc., referred to in your petitioner's petition herein, had been informed that this proceeding in habeas corpus was to be filed herein, announced that he would overrule said motions for injunction unless they were voluntarily withdrawn by the defendants in said cause who had filed same and thereupon said motions were withdrawn by said defendants.

6. Your petitioner says that the only color of authority which said William Purcell had for the issuance of the at-

tachment of your petitioner is by virtue of the provisions of [fol. 109] Sections 11510, 11511 and 11512 of the General Code of the State of Ohio; that if said sections or any of them are or can be construed to authorize the issuance of said order of attachment herein by said William Purcell as Notary Public and as compelling the appearance of petitioner before said Notary Public to give testimony and produce books, papers and documents in pursuance of said order of attachment, then said sections of the statutes and each of them are void and unconstitutional by reason of the provisions of Section 1 of Article I, Section 5 of Article I, Section 10 of Article I, Section 14 of Article I, Section 16 of Article I, Section 1 of Article IV, and Section 32 of Article II of the Ohio Constitution and the Fourteenth Amendment of the Constitution of the United States, and are wholly ineffective to invest said Notary Public with lawful power or jurisdiction to take such actions and proceedings or any of them.

Wherefore your petitioner prays as in his petition herein.
Marshall, Melhorn, Marlar and Martin and Tracy, Chapman & Welles, Attorneys for Petitioner.

Duly sworn to by John W. Koehrman. Jurat omitted in printing.

[fol. 110] In Court of Common Pleas of Lucas County

No. 131925

Exhibit "A" to Amendment to Petition

Clara Sielcken-Schwarz, New York, Plaintiff,

v.

The Woolson Spice Company, a corporation, 2700 Summit Street, Toledo, Ohio. John W. Koehrman, 1719 Superior Street, Toledo, Ohio. Franklin H. Biggs, 2613 Glenwood Avenue, Toledo, Ohio. Marion M. Miller, 2260 Scottwood Avenue, Toledo, Ohio. Frank D. Stranahan, Dixie Highway, Toledo, Ohio. Robert A. Stranahan, Ottawa Hills, Toledo, Ohio. Ammi F. Mitchell, 2057 Glenwood Avenue, Toledo, Ohio. Leroy E. Eastman, 3416 Brookside Road, Toledo, Ohio, as Administrators of the Estate of William

A. Brigham, deceased. Irving Trust Company, a foreign corporation, as Executor of the last will and testament of Herman Sielcken, deceased, Society for Savings Building, Cleveland, Ohio, Defendants.

PETITION FOR EQUITABLE RELIEF

The above named plaintiff, Clara Sielcken-Schwarz, for her cause of action against the above named defendants respectfully alleges and shows:

[fol. 111] 1. That the plaintiff, Clara Sielcken-Schwarz, at and prior to the time of the commencement of this action, was and now is a citizen of the United States and a resident of the State of New York, residing in the City and County of New York in said State.

2. That the defendant, Irving Trust Company, is a corporation duly organized and existing under and by virtue of the laws of the State of New York and has its principal place of business in New York City in said State; that said corporation is duly qualified to do business in Ohio and has appointed a statutory agent pursuant to the Ohio statutes and that said corporation is doing business in this State.

3. That the defendant, The Woolson Spice Company, at all times hereinafter mentioned was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and has its principal place of business at the City of Toledo, in said State; that at all times prior to, on or about July 25th, 1918, the total capital stock of said corporation consisted of 1,800 shares of common stock of a par value of One Hundred Dollars ($100.00) per share.

4. That the defendants, John Koehrman, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan and Robert A. Stranahan, are citizens and residents of the City of Toledo, County of Lucas, State of Ohio, and that the defendants Ammi F. Mitchell and Leroy E. Eastman are the duly qualified and acting administrators of the estate of William A. Brigham, deceased, who at the time of his death was a resident of the City of Toledo, County of Lucas, State of Ohio.

5. That Herman Sielcken, who was a citizen of the United States and domiciled in the City, County and State of New York, died on or about the 8th day of October, 1917, leaving a last Will and Testament wherein he appointed The Columbia-Knickerbocker Trust Company, a corpora- [fol. 112] tion organized and existing under the laws of the State of New York, Executor of his said Will; that thereafter and on or about the 25th day of January, 1918, the said Will was duly admitted to Probate by the Surrogates Court of the County of New York, State of New York, and letters testamentary on the said Will were thereupon duly issued by one of said Surrogates to The Columbia Trust Company, a corporation organized and existing under the laws of the State of New York, as the successor of said The Columbia-Knickerbocker Trust Company; that thereafter and prior to the commencement of this action the defendant, Irving Trust Company, by certain mesne changes of corporate name, became and now is the continuation of the corporate entity and identify of said Columbia Trust Company and thereupon became the duly qualified and acting Executor of said Last Will; that the defendant, Irving Trust Company, has never been discharged as such Executor and that no other individual or corporation has been appointed Executor of said Last Will or administrator of the estate of said Herman Sielcken by said Surrogates Court or by any other court.

6. That said Herman Sielcken, in and by his Last Will and Testament, after providing certain specific legacies all of which have been fully paid and satisfied, gave, devised and bequeathed all the rest, residue and remainder of his property and estate, real and personal, whatsoever and wheresoever situate, absolutely to his wife, Clara Sielcken (by subsequent remarriage Clara Sielcken-Schwarz) who is the plaintiff herein, and that said plaintiff is now the full, complete, absolute and sole beneficial owner of all unadministered and undistributed assets of the estate of said Herman Sielcken.

7. That since the death of the said Herman Sielcken the plaintiff remarried and her present name is Clara Sielcken-Schwarz.

8. That heretofore and prior to the commencement of this action, the plaintiff duly requested the defendant,

Irving Trust Company, as Executor of the Last Will and Testament of said Hermann Sielcken, deceased, to bring [fol. 113] this action in behalf of said estate and sought to persuade said defendant so to do, but that the said defendant has failed, neglected and refused to bring said action, and, therefore, this plaintiff has joined said Irving Trust Company, as such Executor, as a defendant in this action.

9. That at the time of his death said Herman Sielcken was the sole beneficial owner of 824 shares of the capital stock of the defendant, The Woolson Spice Company, said shares being registered on the books of the said corporation in the name of Crossman & Sielcken, under which name the said Hermann Sielcken carried on business; that in addition to said 824 shares there was registered on the books of the said corporation in the name of said Hermann Sielcken, 360 of said shares.

10. That on the 6th day of April, 1917, the Congress of the United States declared that a state of war existed between the United States and Germany and on the 6th day of October, 1917, the Congress of the United States enacted and the President approved the Act known as "The Trading with the Enemy Act."

11. That said Hermann Sielcken at the outbreak of war between the United States and Germany was, as the defendants and said William A. Brigham well knew, temporarily present in Germany on business in behalf of the defendant, The Woolson Spice Company.

12. Plaintiff is informed and believes that the said Herman Sielcken, in the year 1909 acquired by purchase thereof 1,739 shares of the common capital stock of the defendant, The Woolson Spice Company, out of the said total capitalization of 1,800 common shares; that said Hermann Sielcken from the year 1909 until in or about the month of September, 1917, was president and a director of the defendant, The Woolson Spice Company; that subsequent to the purchase by him of said 1,739 shares, said Hermann [fol. 114] Sielcken from time to time sold certain of said shares to various persons including the defendants, Koehrman and Biggs, and said William A. Brigham, but for a large portion of said shares so sold said Hermann Sielcken did not receive prior to his death the purchase price, in-

cluding the purchase price of the shares sold to said defendants, Koehrman and Biggs, and said Brigham, and held said shares so sold as collateral to secure the purchase price thereof; that prior to the ousting of said Hermann Sielcken as president of the defendant, The Woolson Spice Company, as hereinafter more specifically related, the said Brigham was secretary and a director, the defendant Koehrman was general manager and a director, and the defendant Biggs was superintendent and a director of the defendant, The Woolson Spice Company, and were intimately associated in the conduct of the affairs of said corporation with said Hermann Sielcken, who, as hereinbefore stated, owned or controlled a majority of the capital stock thereof and by reason of such control maintained the defendants, Koehrman and Biggs, and said Brigham, in their said positions; that because of their intimate association and acquaintance with the business of the defendant, The Woolson Spice Company, over a period of many years, the defendants, Koehrman and Biggs, and said Brigham were informed upon every detail of said business and well knew the prosperous condition of the affairs of the said corporation.

13. Plaintiff is informed and believes that in or about the month of September, 1917, it being well known to the defendants, Koehrman and Biggs, and said Brigham, that the said Hermann Sielcken was being detained in Germany by the exigencies of the said war between the United States and Germany, that the said Hermann Sielcken was then suffering from a prolonged and serious illness which prevented him from traveling, that even in the event of peace [fol. 115] between the United States and Germany his illness would indefinitely prevent him from returning to his domicile in the United States and that it would be impossible for him to frustrate their plans, said defendants, Koehrman and Biggs, and said Brigham, impelled by motives of avarice, am-ition and hatred toward Hermann Sielcken, and in furtherance and as a part of a fraudulent conspiracy (conceived among them during the spring and summer of 1917) illegally and wrongfully to acquire the control of said The Woolson Spice Company from said Hermann Sielcken, and otherwise to defraud him and to dominate, manage, control, manipulate and exploit said corporation in their own interests, caused to be held a pre-

tended meeting of the Board of Directors of the defendant, The Woolson Spice Company, and by means of their control of the said Board of Directors in the absence of said Hermann Sielcken and without his knowledge or authority wrongfully and fraudulently ousted the said Hermann Sielcken from his office as President of defendant, The Woolson Spice Company, and also wrongfully and fraudulently ousted from his office as Treasurer of defendant, The Woolson Spice Company, one, S. P. Jermain, who, in his capacity as said Treasurer, for many years had been a trusted and loyal representative, associate and adviser of the said Hermann Sielcken, and proceeded to a pretended election of the said Brigham as President of defendant, The Woolson Spice Company; that thereafter and at all times mentioned herein and as a result of the aforesaid wrongful acts, the defendants, Koehrman and Biggs, and said Brigham controlled and dominated the defendant, The Woolson Spice Company, and controlled and regulated the public and private reports of its business, general condition and ownership of its stock, and did fraudulently manipulate the defendant, The Woolson Spice Company, and said reports for their own purposes, as here-
[fol. 116] inafter more specifically set forth.

14. Plaintiff is informed and believes that in justification of their action in ousting Sielcken and seizing control of The Woolson Spice Company and as a further step in the consummation of the said fraudulent conspiracy, the defendants, Koehrman and Biggs, and said Brigham, although they well knew that said Hermann Sielcken in his lifetime and at the time of his death was a citizen of the United States and domiciled in the City, County and State of New York and was not an enemy within the meaning of that term as defined in the "Trading with the Enemy Act", and although they well knew that said Hermann Sielcken had died on October 8, 1917, and that title to all his property in the United States had vested in The Columbia Trust Company as Executor, falsely and maliciously caused to be publicly announced and reported to the Alien Property Custodian that the said Hermann Sielcken was a resident of Germany and an enemy of the United States under the provisions of said "Trading with the Enemy Act", and that said Hermann Sielcken was the owner of the shares of stock of said Woolson Spice Company herein-

before mentioned; that the said defendants and said Brigham, by said false and malicious reports, intended to conceal and distract attention from their wrongful and fraudulent seizure of the control of The Woolson Spice Company in their own interests and hoped thereby to perpetuate and render easier and less likely of discovery their management, control, manipulation, and exploitation of said corporation in their own interests.

15. That upon the qualification of the said Columbia Trust Company as Executor of the said Last Will and Testament of the said Hermann Sielcken and for the purposes of the due administration and distribution of said estate, title to the said 824 shares of stock of the defendant, The Woolson Spice Company, and title to the interest [fol. 117] of said Hermann Sielcken in said 360 shares of said stock, vested in said Columbia Trust Company as such executor.

16. Plaintiff is informed and believes that prior to or shortly after the appointment of The Columbia Trust Company as executor as aforesaid, the defendants, Koehrman and Biggs, and said Brigham broadened and enlarged the scope of their fraudulent conspiracy to include a plan to acquire the said 824 shares and the said 360 shares of the capital stock of the defendant, The Woolson Spice Company, for a grossly inadequate consideration for themselves and the defendants, Miller, Frank D. Stranahan and Robert A. Stranahan, to whom the said plan was communicated and who aided, abetted and participated in said fraudulent plan.

17. Plaintiff is informed and believes that in furtherance of said fraudulent conspiracy, wrongfully and illegally to acquire said stock at a grossly inadequate consideration, the defendants, Koehrman and Biggs, and said Brigham aided and abetted by sundry other persons, and taking advantage of their wrongful control and domination over the affairs of the defendant, The Woolson Spice Company, and taking advantage of their peculiar and superior knowledge of the affairs of said Company and of the necessity of the said Executor to rely upon them for information concerning the business of said Company, carried on a campaign of misrepresentation calculated and designed to mislead and deceive the said Executor as to the value of said

stock and as to the necessity of an immediate sale to avoid practically total loss. Plaintiff is further informed and believes that as part of said campaign of misrepresentation said individual defendants and said Brigham falsely and fraudulently misrepresented to said Columbia Trust Com-
[fol. 118] pany, as such Executor, that said stock was of small and constantly decreasing value, although in truth and in fact, as such defendants and said Brigham well knew, said stock was of a value of upwards of $2,000.00 per share and was constantly appreciating in value, that the fact that the Estate of Hermann Sielcken, who said defendants falsely and wrongfully asserted had been an alien enemy, owned the said 824 shares of stock which had theretofore been transferred into the name of said Trust Company as such Executor, had seriously injured and was progressively injuring the business of the defendant, The Woolson Spice Company, that such circumstances had seriously depreciated and was progressively depreciating the value of said stock, that an immediate sale was necessary to save the business from destruction, that orders were being cancelled daily, that unless an immediate sale were made the said stock could not be sold at all and that only a very small amount could then be realized through liquidation. Plaintiff is further informed and believes that the individual defendants and said Brigham well knew that the business of the defendant, The Woolson Spice Company, had not been injured and depreciated, but on the contrary was in a very prosperous condition, that the volume of said business had largely increased over the preceding year, that said Company had large contracts for furnishing coffee, spices and supplies to the armies of the United States, that unusual profits were anticipated, and that said stock had not depreciated in value, but on the contrary, would, as the individual defendants and said Brigham well knew, be largely increased in value so soon as the secret knowledge of such defendants and said Brigham as to the increased business and the prosperity of the defendant, The Woolson Spice Company, should become known to the public generally. Plaintiff is further informed and believes that said false and wrongful misrepresentations were
[fol. 119] intended to and did cause said Columbia Trust Company, as such Executor, which was unfamiliar with the affairs and business of said corporation, and which neces-

sarily as a fiduciary stockholder of such corporation relied upon the reports, statements and representations of the defendants and said Brigham, who were the managing officers and directors of said corporation as aforesaid, as to the condition of its affairs, to believe that it would be impossible to secure a substantial price for the said stock, that said stock had greatly depreciated in value and was constantly depreciating in value, and that an immediate sale of said stock was necessary to avoid a total loss of said asset of the said estate. Plaintiff is further informed and believes that as a result of the aforesaid misrepresentations so relied upon the Executor was fraudulently induced to sell said stock to the individual defendants and said Brigham for a grossly inadequate price, as hereinafter more particularly set forth.

18. Plaintiff is informed and believes that in furtherance of said conspiracy the individual defendants and said Brigham, conspiring among themselves and with sundry other persons, falsely and fraudulently represented to and advised The Columbia Trust Company that any publicity regarding a sale of said shares or any attempt to obtain purchasers for said shares, other than said individual defendants and said Brigham, would react disastrously on the business of said Woolson Spice Company and the value of said shares; that thereby said Columbia Trust Company, as such Executor, was misled and induced to refrain from calling said shares to the attention of other persons who might be interested therein as purchasers and to refrain from advertising the fact that said shares of stock were for sale, and was thereby misled into making a hurried sale of said shares to said defendants Koehrman, Biggs, Miller, [fol. 120] Frank D. Stranahan and Robert A. Stranahan and to said Brigham, without competition, publicity or adequate advertising in the press, for a grossly inadequate price; that said defendants and said Brigham, who were the directors and managing officers of The Woolson Spice Company, and the other individual defendants associated with them in said fraudulent conspiracy, took advantage of the peculiar knowledge of said officers as to the prosperity of the defendant, The Woolson Spice Company, and the value of its stock, to acquire the shares of such fiduciary

stockholder, The Columbia Trust Company, for a grossly inadequate price.

19. Plaintiff is informed and believes that in furtherance of said conspiracy the defendants, Koehrman and Biggs, and said Brigham conspiring among themselves and sundry other persons, falsely and fraudulently represented to and threatened The Columbia Trust Company that unless said shares were immediately sold to the individual defendants and said Brigham at a price fixed by them or if said shares were sold to any other person or persons, then they, the managing officers and directors of the defendant, The Woolson Spice Company, would forthwith leave the employ of said corporation and involve it in immediate disaster and ruin; that thereby said Columbia Trust Company, as such executor, was misled and wrongfully coerced into making a hasty sale of said shares to the said individual defendants and to said Brigham at a grossly inadequate price fixed by them and upon their own terms and without attempting to obtain bids from other possible purchasers.

20. Plaintiff is informed and believes that as part of and in furtherance of said conspiracy to acquire said shares at a grossly inadequate price, the defendants, Koehrman and Biggs, and said Brigham falsely and fraudulently mis-[fol. 121] represented the condition of said Company to other prospective purchasers of said stock and attempted to and did effectively foreclose competition by such misrepresentation and by making threats to prospective purchasers that if such prospective purchasers competed with the individual defendants and said Brigham in the matter of the acquisition of said shares, then the management of the defendant, The Woolson Spice Company, would immediately quit and involve the corporation in chaos and ruin.

21. Plaintiff is informed and believes that in furtherance of said fraudulent conspiracy the defendants, Koehrman and Biggs, and said Brigham attempted to conceal from said Columbia Trust Company, and as officers and directors of defendant, The Woolson Spice Company, prevented said corporation from disclosing to The Columbia Trust Company the existence of an alleged claim in favor of the defendant, The Woolson Spice Company, or that said corporation asserted an alleged claim against the estate of

Hermann Sielcken in a sum in excess of Nine Hundred Thirty-two Thousand Dollars ($932,000.00). Plaintiff is further informed and believes that when prior to the said sale of said shares of The Woolson Spice Company to the individual defendants and said Brigham, The Columbia Trust Company, as such Executor, learned of the existence of said alleged claim from other sources, said individual defendants and said Brigham falsely and fraudulently represented to and assured The Columbia Trust Company that said alleged claim had little if any merit and that a recovery thereon, if any, would be of a negligible amount, although said individual defendants and said Brigham then believed they could and intended to take advantage of the [fol. 122] death of Hermann Sielcken, the circumstance that they were the sole survivors who had personal knowledge of many of the relations between the defendant, The Woolson Spice Company, and Hermann Sielcken in his life time, and their complete domination and control over the defendant, The Woolson Spice Company, its books, papers and records to enable said defendant, The Woolson Spice Company, through their connivance and assistance successfully to prosecute such alleged claim and recover from the estate of Hermann Sielcken a sum in excess of Nine Hundred Thirty-two Thousand Dollars ($932,000.00), and further falsely and fraudulently represented to and assured The Columbia Trust Company that neither they nor the defendant, The Woolson Spice Company, had any intention to assert said alleged claim against the estate of Hermann Sielcken, either presently or after the sale of said shares, although said individual defendants and said Brigham well knew that the defendant, The Woolson Spice Company, was at the time of such representations and assurances intending and planning to assert said claim as soon as the sale of said shares should be consummated, and although said individual defendants and said Brigham, as officers, directors, shareholders and prospective shareholders of de fendant, The Woolson Spice Company, were at the time of making such representations and assurances intending to force and compel the defendant, The Woolson Spice Company, to assert said alleged claim as soon as the sale of said shares should be consummated. Plaintiff is further informed and believes that the individual defendants and

said Brigham, by means of such and sundry other false and deceitful representations, assurances and advices, misled, induced and wrongfully prevailed upon The Columbia Trust Company as such Executor, to make a hurried sale of such shares to the individual defendants and to said [fol. 123] Brigham without asking an adequate or thorough investigation of said alleged claim, or without judicially determining or settling the same. Plaintiff is further informed and believes that said individual defendants and said Brigham so attempted to conceal such alleged claim, so prevented The Woolson Spice Company from divulging the same, made such false representations and deceitful assurances and caused said corporation to delay asserting said alleged claim against the estate of said Hermann Sielcken until after the consummation of said sale in order that the value of said shares might not thereby be increased because of the existence of said alleged claim or by the fruits thereof, should the same be settled or judicially determined prior to said sale. Plaintiff is further informed and believes that the defendant, The Woolson Spice Company, aided and abetted the individual defendants and said Brigham in consummating said conspiracy to purchase the aforesaid shares for a grossly inadequate price, actively participated therein and delayed asserting said alleged claim against the estate of Hermann Sielcken in order that the individual defendants and said Brigham might acquire the controlling interest in said corporation prior to the assertion of said alleged claim, in the expectation and with the purpose of thereby more effectively prosecuting said claim against the estate of said Hermann Sielcken. Plaintiff is further informed and believes that subsequent to the sale of said shares the said individual defendants and said Brigham caused the defendant, The Woolson Spice Company, to assert and the said corporation did assert the said claim against the said estate and instituted an action in the Supreme Court of the State of New York against said Columbia Trust Company as such Executor, to recover said amount, and that thereafter such proceedings were had in the said action that said Columbia Trust Company, as such executor, settled and compromised [fol. 124] the said claim by the payment to the defendant, The Woolson Spice Company, of the sum of Two Hundred

Eighty-four Thousand Six Hundred Eighty-nine and 16/100 Dollars ($284,689.16) from the funds of the estate, no part of which sum was taken into consideration on arriving at the value of said stock.

22. Plaintiff is informed and believes that, it being well known to said individual defendants and to said Brigham that certain loyal personal and business friends, associates and trusted advisers of the said Hermann Sielcken, including John Doyle, general counsel and former director of the defendant, The Woolson Spice Company, and Joseph Picksley, director and stockholder of The Woolson Spice Company, would exert their powers and influence to prevent a sale of said shares of the grossly inadequate price of approximately Six Hundred Eighty Dollars ($680.00) per share contemplated by said individual defendants and said Brigham and it being feared by said individual defendants and said Brigham that if said friends, associates and advisers of the said Hermann Sielcken were forewarned of said sale and said proposed price they might thwart said conspiracy by correctly informing the Columbia Trust Company as to the value of said shares and as to the existing and expected prosperity of The Woolson Spice Company, and by informing it of other persons who would be interested in purchasing said shares, the said individual defendants and said Brigham, in furtherance of said fraudulent plan to acquire said stock and conspiring among themselves and with sundry other persons, concealed from the said friends, associates and advisers of Hermann Sielcken the facts that said shares of stock were for sale and that they contemplated purchasing the same, the price which they planned to pay for said shares and all the details arranged in connection with said sale as hereinabove and hereinafter more specifically set forth, and by means of the aforesaid and sundry other false and deceitful misrepresentations, [fol. 125] advices, assurances, concealments and threats, induced The Columbia Trust Company, as such executor, to conceal said facts, price and details from the said friends, associates and advisers of Hermann Sielcken.

23. Plaintiff is informed and believes that in consummation of said conspiracy the individual defendants and said Brigham, aided and abetted by sundry other persons, by means of the aforesaid false and deceitful misrepresenta-

tions, advices, assurances, concealments and threats, induced The Columbia Trust Company, as such Executor, to enter into a private agreement to sell said shares to the individual defendants and to said Brigham at the grossly inadequate price of $680.00 per share, although, as said defendants and said Brigham well knew, the market value of said stock was approximately $2,000.00 per share.

24. That thereafter, as plaintiff is informed and believes, the individual defendants and said Brigham, conspiring among themselves and with sundry other persons, coerced and misled the Executor into consenting to a pretended auction sale (at which in fact competitive bidding had been foreclosed as hereinafter set forth) for the purpose of concealing the private contract of purchase of said shares of The Woolson Spice Company which said individual defendants and said Brigham had obtained through the fraud, deception and coercion practiced upon said Executor and to create an appearance that said sale rested upon a public auction in the hopes of foreclosing inquiry into the private contracts of sale so effectuated through the fraud of said individual defendants and said Brigham.

25. Plaintiff is informed and believes that shortly prior to the 24th day of July, 1918, said individual defendants and said Brigham were advised by The Columbia Trust [fol. 126] Company that said 824 shares and said 360 shares would be put up for sale at auction in the City of New York on July 24, 1918, that thereupon in furtherance of said conspiracy and for the purpose of chilling the bidding at said auction sale, said individual defendants, said Brigham and sundry other persons, each of whom was a prospective bidder for said shares, and all of whom were aided and abetted by sundry other persons, wrongfully and fraudulently agreed among themselves that one of their number, to-wit, the defendant, Marion M. Miller, would bid for and purchase said shares without competition from the other individual defendants and said Brigham and said other persons and that upon the acquisition of said shares by the said Marion M. Miller, the same should be divided among said individual defendants, said Brigham and said other persons; that in compliance with said wrongful agreement the defendant, Marion M. Miller, attended said auction sale and purchased said shares without competition

at a grossly inadequate price, said other individual defendants, said Brigham and other persons, in accordance with said agreement, refraining from bidding therefor, and that forthwith said shares were divided among the said conspirators as theretofore agreed upon.

26. Plaintiff is informed and believes that in order to further wrongfully chill the bidding at said auction sale said individual defendants and said Brigham conspiring among themselves and sundry other persons, by means of the aforesaid false and malicious representations, assurances, advices, concealments and threats, induced The Columbia Trust Company, as such Executor, to refrain from making any extensive or adequate advertising of said auction and to make certain special arrangements and agreements with them as to the terms of said auction sale, to-wit, that said individual defendants and said Brigham were to be permitted to make a deposit of $100,000.00 with The Columbia Trust Company as a down payment on said shares and were to be allowed thirty days after said auction [fol. 127] within which to pay the balance of their purchase price, whereas, the public and all other prospective purchasers were to be required to deposit 10% of their bids with the auctioneer at the time of the sale, and to pay the balance thereof to such auctioneer before one o'clock on the day following said sale.

27. Plaintiff is informed and believes that on or about the 24th day of July, 1918, said Columbia Trust Company, as such Executor, misled, deceived and coerced by the aforesaid false and malicious misrepresentations, assurances, advices, concealments and threats of said individual defendants and said Brigham, put up the said 824 shares and said 360 shares at auction in the City of New York, and, without adequate notice or advertisement of said sale, sold said 824 shares and said 360 shares without competition to the defendant, Marion M. Miller, on behalf of himself and said other individual defendants and said Brigham, at the terms theretofore agreed upon as aforesaid at the price of Six Hundred Eighty Dollars ($680.00) per share, although the said individual defendants and said Brigham knew that the market value of said stock was approximately Two Thousand Dollars ($2,000.00) a share.

28. That thereafter the said Columbia Trust Company, as such Executor, still being misled, deceived and coerced by the aforesaid false and malicious misrepresentations, assurances, advices, concealments and threats of the individual defendants and said Brigham, caused to be presented to the defendant, The Woolson Spice Company, certificates for the said shares of stock, and said defendant, The Woolson Spice Company, with full knowledge that the transfer of said stock was the consummation of a gross fraud upon said Executor by the individual defendants and said Brigham, and with the expectation of deriving certain improper and unjustifiable benefits therefrom, as hereinbefore more [fol. 128] particularly set forth, thereupon actively aided, abetted and participated in the consummation of said fraud and wrongfully and illegally transferred said stock into the names of the individual defendants and said Brigham and/or their nominees and caused certificates therefor to be issued and delivered accordingly.

29. Plaintiff is informed and believes that prior to the purchase of said shares as aforesaid and in furtherance of said conspiracy to acquire the same at a grossly inadequate price, the said individual defendants and said Brigham having insufficient means with which to effect said purchase without assistance, knowing full well that the defendant, The Woolson Spice Company, was in a position to make a large cash distribution by way of dividends and/or to borrow large sums from sundry financial institutions, and taking advantage of their peculiar knowledge of the condition and affairs of the defendant, The Woolson Spice Company, and of their control and domination over said corporate defendant as aforesaid, conspired and arranged with the defendant, The Woolson Spice Company, and sundry other persons that upon the consummation of the aforesaid sale the defendant, The Woolson Spice Company, would procure and advance and/or distribute to the individual defendants and to said Brigham sufficient funds with which to pay for said shares; that the aforesaid arrangement was concealed from The Columbia Trust Company as such executor, it being led to believe by the individual defendants and said Brigham as aforesaid that the defendant, The Woolson Spice Company, was without excess assets and had a restricted and weak credit and that its prospective earning capacity was rapidly declining; that because of such concealments

and misrepresentations The Columbia Trust Company, as such Executor, was induced to make said sale as hereinabove set forth; that shortly after the sale of said shares as afore- [fol. 129] said and prior to the payment of the purchase price thereof, the defendant, The Woolson Spice Company, procured and distributed and/or advanced to the individual defendants and to said Brigham a sum or sums of money sufficient to pay the purchase price of said shares as theretofore arranged as aforesaid between the defendant, The Woolson Spice Company, and said individual defendants and said Brigham with the help and assistance of sundry other persons.

30. That since said issue and delivery of said certificates to said individual defendants and said Brigham and/or their nominees, the defendant The Woolson Spice Company has paid sundry dividends to said individual defendants, said Brigham, their nominees and transferees in stock and money, no part of which has been paid to the Executor of the estate of Herman Sielcken or to any beneficiary of that estate; and that the plaintiff, as the residuary legatee and beneficiary of said estate, has been thereby deprived by the said fraud and wrongdoing of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, of the said 824 shares of stock and of the dividends declared and paid thereon, or of a large sum of money representing the fair market value of said stock and the amount or value of said dividends with interest from the date of payment.

31. That the said fraud and unlawful acts of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, hereinbefore more particularly set forth, were not discovered by the plaintiff until about March, 1931, and, on information and belief, were not discovered by the defendant, Irving Trust Company, until on or about said date.

32. Plaintiff is ready, able and willing to pay to the defendants or any one of them, such sum or sums of money, if any, as this Court may determine is due and owing to any [fol. 130] or all of the individual defendants or to the defendant administrators of the estate of said Brigham, by reason of the payment by them and said Brigham of the aforementioned sums as purchasers of said shares, or plaintiff is ready and willing to have this Court set off against

any sum which it may determine to be due and owing to plaintiff or to the Irving Trust Company, as such Executor, by any of the defendants any sum which the said defendants or said Brigham may have paid as purchasers of said stock.

33. That the plaintiff is without adequate remedy at law.

Wherefore, the plaintiff prays:

1. That the defendant, The Woolson Spice Company, be required to account to the plaintiff for the said 824 shares of its common capital stock or such shares as the said 824 shares of stock may represent in any recapitalization of said Company which may have occurred since the sale of said 824 shares and register the plaintiff upon its books as the owner of said stock, and issue to her certificates for said shares of stock.

2. That in the event that The Woolson Company does not have in its treasury or under its control sufficient shares of stock to enable it to issue to the plaintiff certificates for said shares of stock, that the Court require the defendant, The Woolson Spice Company, the individual defendants herein and said defendant administrators, Ammi F. Mitchell and Leroy E. Eastman, to pay to said plaintiff the reasonable value of said shares of stock or the reasonable value of such shares of stock as may be represented by said 824 shares in any recapitalization of said corporation.

3. That the defendant, The Woolson Spice Company, the individual defendants and said defendant administrators be required by the decree of this court to account to the plaintiff for all dividends which have accumulated and/or been paid upon said 824 shares of stock since July 25, 1918, or upon any stock represented by said 824 shares of stock in [fol. 131] any recapitalization of said corporation, together with interest upon said dividends from the date of payment thereof.

4. That the individual defendants, said defendant administrators and each of them be required by order of this Court to produce and surrender for cancellation any certificates issued in their names or in the name of William G. Brigham for any of said 824 shares of stock or for any

shares of stock represented by said 824 shares in said recapitalization of said corporation.

5. That the individual defendants, said defendant administrators and the defendant, The Woolson Spice Company, be enjoined, except under order of this Court first having been obtained, from transferring any of its shares of stock or from issuing certificates for further shares of stock and from changing in any way its present capital structure.

6. That the plaintiff have such other and further relief in the premises as the Court may deem meet and just.

(Signed) Baker, Hostetler, Sidlo & Patterson.
(Signed) Fraser, Hiett, Wall & Effler, Attorneys for the Plaintiff.

Duly sworn to by Clara Sielcken-Schwarz. Jurat omitted in printing.

[fol. 132] In Court of Appeals of Lucas County, Ohio

Ex Parte John W. Koehrman

Writ of Habeas Corpus

Filed June 15, 1932

State of Ohio,
Lucas County, ss:

To Joseph Zimmerman, Sheriff of Lucas County, Ohio:

We command you that the body of John W. Koehrman, in your custody detained and restrained of his liberty, as it is said, you take and have before the Court of Appeals of Lucas County, Ohio, or before one of the judges of said court, at the courtroom of said court in the courthouse of said county, on the 15th day of June, 1932, at 9:30 A. M. o'clock, to do and receive what said court or said judge shall then and there consider, concerning him in that behalf; and have you then and there this writ.

In witness whereof, I, George E. Hardy, Clerk of said Court of Appeals, have hereunto set my hand and affixed the seal of said court this 14th day of June, 1932.

(Signed) Geo. E. Hardy, Clerk, by (Signed) M. E. Theuerkauff, Deputy Clerk. (Seal.)

Sheriff's Return

Received this writ June 14th, 1932, at 10:45 A. M., and pursuant to its command I do now have, this 15th day of June, 1932, at 9:30 A. M., the body of John W. Koehrman before the Court of Appeals of Lucas County, Ohio.

I certify that the cause and reason for my having the said John W. Koehrman in custody arises from and is because of a writ and commitment papers issued and delivered to me by William Purcell, Notary Public, Lucas County, Ohio, which said writ and commitment papers I hereto attach and make a part hereof as completely as though fully rewritten herein.

Joseph Zimmerman, Sheriff, by (Signed) Rolland Staggemeier, Deputy.

Costs $.91.

[fol. 133] For the "writ and commitment papers" attached to the foregoing Return, see the writ of attachment of appellant, John W. Koehrman, which appears as an Exhibit to the Pleading entitled "Petition for Writ of Habeas Corpus", at pages 105 to 106, supra, of this Transcript; and the subpœna duces tecum on this appellant, which appears as an Exhibit to the same Pleading, at pages 103 to 104, supra, of this Transcript; both of which Exhibits are here incorporated by reference thereto as fully as though repeated verbatim.

The Sheriff's Return of service of said Writ of attachment, endorsed thereon, is as follows:

Sheriff's Return

Received this writ June 13, 1932, 11:25 A. M. and pursuant to its command I did attach the body of John W. Koehrman, June 14, 1932, and had him before William Purcell, Notary Public, Lucas County, Ohio, in the Court Room of the Court of Appeals, Lucas County, Ohio.

Joseph Zimmerman, Sheriff, Rolland Staggemeier, Deputy.

Costs $.91.

The Notary Public's return of service of said subpœna duces tecum, endorsed thereon, is as follows:

State of Ohio,
Lucas County, ss:

William Purcell, being first duly sworn, says that on Tuesday, June 7th, at about two thirty o'clock P. M., he served a copy of the within subpœna upon John W. Koehrman, personally, at the office of The Woolson Spice Company, Summit Street, Toledo, Ohio.

William Purcell.

Sworn to before me and subscribed in my presence [fol. 134] this 8th day of June, 1932. Fred M. Kramp, Notary Public, Lucas County, Ohio. (Seal.)

(Rubber stamp:) (Fred M. Kramp, Notary Public, Lucas County, Ohio.)

[fol. 135] In Court of Appeals of Lucas County, Ohio

C. A. No. 2692

Ex Parte John W. Koehrman

Recognizance—Filed June 17, 1932

The State of Ohio,
Lucas County, ss:

Be it remembered, that on June 14th, 1932, John W. Koehrman personally appeared before this court, and acknowledged himself to owe the State of Ohio the sum of One Hundred Dollars ($100.00), to be levied of his goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such that if the above bound John W. Koehrman be and appear before this Court of Appeals, on the fifteenth day of June, 1932, and abide the judgment of this court, and not depart without leave, then this recognizance shall be void; otherwise it shall be and remain in full force and virtue in law.

(Signed) John W. Koehrman.

Taken and acknowledged before me, on the day and year above written.

George E. Hardy, Clerk of the Court of Appeals.

[fol. 136] IN COURT OF APPEALS OF LUCAS COUNTY, OHIO

No. 2692

EX PARTE JOHN W. KOEHRMAN

MOTION FOR NEW TRIAL—Filed June 22, 1932

Now comes the petitioner, John W. Koehrman, and moves the Court to vacate and set aside the findings and judgment of the Court herein and for a new trial of this cause, for the following reasons materially affecting the substantial rights of such petitioner:

(1) The Court erred in not finding and adjudging that petitioner was unlawfully deprived of his liberty, and in not discharging him.

(2) The Court erred in re-committing and remanding petitioner to the custody of the respondent.

(3) The finding, decision and judgment of the Court are contrary to law.

(4) The finding, decision and judgment of the Court are not sustained by sufficient evidence.

(5) The finding, decision and judgment of the Court are erroneous, in that there is no evidence to sustain them.

(6) The Court erred in not finding and adjudging that the order of attachment under which petitioner was imprisoned by the respondent was void and of no effect.

(7) The Court erred in not finding and adjudging that the petition of the plaintiff in the case in which it was attempted to take said depositions, viz: Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio; entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company et al., defendants, stated no cause of action whatever and tendered no issue whatever and that no testimony which petitioner could give and no books, papers or documents which petitioner could produce would be relevant or material to any issue whatever under said alleged petition or in said alleged action and that therefore the action of the notary public in attempting to adjudge that petitioner was in contempt and in issuing an attachment for peti-

tioner and bringing about his arrest and detention violated the provisions of Sections 1 and 16 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States and were illegal, null and void.

[fol. 137] The Court erred in not finding and adjudging that the petition of the plaintiff in said case No. 131,925 in the Court of Common Pleas of Lucas County, Ohio, in which it was attempted to take said depositions, affirmatively showed that said plaintiff had no capacity or right whatever to bring or prosecute said action or to take any depositions at all therein or to enforce the attendance or testimony of any witnesses or the production of any books, papers or documents, and that therefore the action of the notary public in attempting to adjudge that petitioner was in contempt and in issuing an attachment for petitioner and bringing about his arrest and detention violated the provisions of Sections 1 and 16 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States and were illegal, null and void.

(9) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article I of the Constitution of the State of Ohio and are null and void, in that they deprive the petitioner of his liberty and property, contravening that part of Section 1 of Article I, which provides that all men "have certain inalienable rights, among which are those of enjoying and defending liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety."

(10) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case are in conflict with and violate the provisions of Section 14 of Article I of the Constitution of Ohio, and are null and void, in that they deprive the petitioner of security in his person, papers and possessions, and subject him to un-

reasonable search and seizure, contravening that part of Section 14 of Article I, which provides that the "right of the people to be secure in their persons, houses, papers and possessions against unreasonable searches and seizures shall not be violated."

(11) The Court erred in not finding and adjudging that Section 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Sections 5, 10 and 16 of Article I and Section 32 of Article II of the Constitution of Ohio, and are null and void.

(12) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of said sections as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article IV of the Con-[fol. 138] stitution of Ohio, in that they attempt to confer judicial power on notaries public.

(13) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, and are null and void, in that they deprive the petitioner of his liberty and property without due process of law; contravening that part of Section 1 of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

(14) The Court erred in not finding and adjudging that said notary public had no jurisdiction to attempt to take said depositions or to force or require petitioner to attend as a witness or to produce any books, papers or documents or to adjudge petitioner in contempt for failing or refusing so to do, or to make or issue any order of attachment against this petitioner.

(15) The Court erred in not finding and adjudging that said notary public, in attempting to adjudge petitioner in

contempt and in issuing an attachment for him, attempted to exercise judicial powers in violation of Section 1 of Article IV of the Constitution of Ohio, and that all of said acts of said notary were null and void.

(16) The Court erred in not finding and adjudging that the notary public purporting to act under said Sections 11510, 11511 and 11512 of the General Code of Ohio and attempting to adjudge the petitioner guilty of contempt and issuing said order of attachment for his person, was disqualified on account of his personal pecuniary interest in the taking of said depositions so to adjudge and act and to cause any attachment to be issued against petitioner by reason of the fact that said notary public was employed and paid by the plaintiff in said alleged pending suit, the notary's judgment of contempt and attachment being made and issued at the request of said plaintiff and that his employment was upon such terms that its extent and continuance and his continued compensation was contingent upon procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and attachment and that therefore said notary's acts in so adjudging and bringing about petitioner's attachment and detention were a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States of America and a denial of the right of redress in courts and of a remedy by due course of law in violation of section 16 of Article I of the Constitution of the State of Ohio, and were null and void.

[fol. 139] (17) The Court erred in not finding and adjudging that the attempted adjudication by the notary that the petitioner was in contempt and the issuance of an attachment against him in petitioner's absence and without notice to him or to his counsel and without an opportunity for him first to know the charges against him or to have a hearing thereon were in violation of petitioner's constitutional rights under Sections 1, 5, 10, 14 and 16 of Article I and Section 1 of Article IV of the Ohio Constitution and each of such sections and in violation of his rights under the Fourteenth Amendment of the Constitution of the United States and were null and void.

(18) The Court erred in not finding that the purported subpœna duces tecum issued by said notary was illegal and

void, both on account of its general, vague and indefinite character and because it constituted an unreasonable search and seizure in violation of Section 14 of Article I of the Constitution of Ohio, and also in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America.

(19) The Court erred in not finding and adjudging that the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, in which it was attempted to take said depositions was not entitled to take depositions nor did the notary public have power or jurisdiction to issue any subpœna requiring the attendance of any witness or issue any attachment for any witness for the reason that no service of summons had been made on one of the defendants in said action, viz: Marion M. Miller, nor had any service been made on the defendant Irving Trust Company in its capacity as Executor of the Estate of Hermann Sielcken, deceased.

(20) The Court erred in not finding and adjudging that the attempt of the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants, to take depositions in said case was not in good faith for the purpose of securing or perpetuating any evidence material to any issue of said case or for use in the trial of said case or that it was not otherwise in good faith, but was an abuse of process.

(21) The Court erred in other respects apparent on the face of the record.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Petitioner.

[fol. 140] [File endorsement omitted]

In Court of Appeals of Lucas County

Petitioner's Bill of Exceptions

Filed June 23, 1932.

Notified: Waived.

Delivered to Hon. Harry W. Lloyd, S. S. Richards, Roy H. Williams June 23-32.

Received from Hon. Harry W. Lloyd, S. S. Richards, Roy H. Williams June 23-32.

[fol. 141] [Title omitted]

Appearances:

Messrs. Tracey, Chapman & Welles, by Messrs. George D. Welles and Harry S. Bugbee; Messrs. Marshall, Melhorn, Marlar & Martin, by Mr. Stuart S. Wall, for the petitioner.

Messrs. Fraser, Hiett, Wall & Effler, by Mr. Harold W. Fraser; Messrs. Baker, Hostetler, Sidlow & Patterson, by Mr. R. T. Jackson, for the respondent.

Be it remembered that on the trial of the above entitled action in the Court of Appeals, Lucas County, Ohio, in the May Term of said Court, A. D. 1932, said trial beginning on the 15th day of June, A. D. 1932, before the Honorables Harry W. Lloyd, Silas S. Richards and Roy H. Williams, Judges of the said Court, the following proceedings were had, viz:

COLLOQUY

Mr. Welles: Mr. Stranahan, one of the petitioners was here and by consent of counsel he has been permitted to go subject to return on call. Before proceeding with this case we would like, if Your Honors please, to have leave to file in each of the three pending cases of Ex Parte Koehrman, Ex Parte Bevan and Ex Parte Stranahan leave to file amendments to the petition for writs of habeas corpus. We have given counsel on the other side copies of the proposed amendment.

Judge Lloyd: They may be filed.

Objection; exception.

Mr. Welles: We should direct the court's attention to the fact that there is, as we are informed, no return or answer from the sheriff at this time. We assume that before we proceed there should be.

Mr. Fraser: If your Honors please, the sheriff is here with the bodies of these men and with his return and I [fol. 142] understand the practice is to hand you the return when he hands you the bodies.

Mr. Welles: I may be in error, but I understand that the return constitued an answer which raised such issues, if any, of fact as the sheriff thought proper to raise and

that the question of the propriety of the custody really is dependent upon the return made by the sheriff, showing whether or not he does have legal custody.

Judge Lloyd: Have you the returns here? Let's see them.

Deputy Sheriff Staggemeier: Here they are (handing returns to the court).

Mr. Fraser: The return in each case is accompanied by the original papers under which the sheriff is holding these men, as an exhibiton to the court as to why he is holding them.

Judge Lloyd: I suppose we can go on with the hearing now.

Mr. Welles: May we see what the return says?

Judge Lloyd: Each is like the other. Here they are.

Mr. Welles: If your Honors please, in order to save time and get forward with this thing, we would like, with the court's permission, to save our objection to the return on the ground that it does not show any legal cause for the arrest or detention of any of the petitioners and without waiving that point we will proceed with the evidence, first making a statement. These three petitions for writs of habeas corpus arise by reason of writs issued by William Purcell, a notary public, in a case pending in the Court of Common Pleas of this county in which one Clara Sielcken Schwarz is the plaintiff and The Woolson Spice Company, John W. Koehrman, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan, Robert A. Stranahan, Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William A. Brigham, deceased, and The Irving Trust Company, a foreign trust company, as executor of the estate of Herman Sielcken, deceased, are named as defendants. The petitioner Bevan was served with a subpœna duces tecum, which is attached to his petition and he appeared before the notary and answered certain questions and then, upon the advice of his counsel, declined to an- [fol. 143] swer certain questions. Counsel for the defendants appeared at that occasion for the sole purpose, as shown by the record, of protesting and objecting to the taking of depositions on various grounds which I will come to in a moment. Petitioners Robert A. Stranahan and Frank D. Stranahan, were served with writs of attachment. I should say the petitioners Robert A. Stranahan and John

W. Koehrman were served with writs of attachment, requiring them to appear before the same notary public to give testimony and directing the sheriff to produce them for that purpose there. The petition in the case of Clara Sielcken Schwarz v. The Woolson Spice Company, et al., is one in which the plaintiff alleges that she is residuary legatee of Herman Sielcken, deceased, and that The Irving Trust Company, a New York corporation, is the executor, still undischarged and acting under the will of Herman Sielcken, deceased. The petition attempts to charge a conspiracy alleged to have been devised and carried out in the years 1917 and 1918 by the defendants Koehrman, Biggs, Miller, the two Stranahans, W. A. Brigham, deceased, represented by Mitchell and Eastman as administrators. It is also charged that The Woolson Spice Company was a co-conspirator with the individual defendants. The petition attempts to charge that a sale of stock of The Woolson Spice Company by The Irving Trust Company as executor to the individual defendants, or some of them, was brought about by fraudulent representations or misrepresentations. The plaintiff seeks to have the sale of the stock in the amount of 824 shares of the old stock of The Woolson Spice Company set aside. She requests that the existing stock of The Woolson Spice Company issued in lieu of that should be transferred to her, that the corporation should be required to do so and that she may have an accounting and that she may receive all dividends, disbursements of every kind, which have been made by The Woolson Spice Company to the owners of this stock from the year 1918 down to the present time. The petition is very lengthy, it contains some twenty-eight pages, but the main point claimed and the main relief asked is as I have stated. The plaintiff seeks to excuse the long delay in the presentation of this claim and in the attempt to enforce it by an [fol. 144] allegation to this effect, it is paragraph 31 of the petition:

"That the said fraud and unlawful acts of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, hereinbefore more particularly set forth were not discovered by the plaintiff until about March, 1931, and, on information and belief, were not discovered by the defendant, Irving Trust Company, until on or about said date."

That is all that there is in the way of explanation or attempted explanation as to why this matter has been permitted to rest since 1918. As I have said, the theory of this petition is that there was a fraud, an actual fraud, committed by the defendants so attempted to be charged. But as your Honors will see when you come to examine the petition in the main case, nearly every allegation attempting to make any charge of wrongdoing I think, all except one, is made upon information and belief. The Irving Trust Company, it is alleged, upon demand having been made upon it to bring this suit as executor, declined to do so and the attempt is therefore made to make it a party defendant as executor. We expect the evidence here will show that the Irving Trust Company as executor is not in this case in any way. The Irving Trust Company itself has been permitted to do business here but the Irving Trust Company as executor of the estate of Herman Sielcken is not in this state or admitted to do business here. A demurrer has been filed in the Court of Common Pleas to this petition by one of the defendants, namely Franklin H. Biggs, the grounds of the demurrer are: first, that the plaintiff has not legal capacity to sue, and second, that the petition does not state facts which show a cause of action.

Judge Lloyd: When was that filed, how long ago was that?

Mr. Welles: It was filed on June 11, 1932.

Judge Lloyd: I was wondering why it had not been heard.

Mr. Welles: I may say if it is important, the evidence here will be to the effect that we offered to have it heard immediately, prior to the going forward of these depositions or the attempt to go forward with them, and that counsel representing the plaintiff said they preferred to [fol. 145] have that demurrer heard in the usual and ordinary course. We filed a brief with the court with the number of points raised in the demurrer, and filed a copy of that with counsel for plaintiff. Then, third, that there is a misjoinder of parties defendant; fourth, that there is a defect of parties plaintiff; four-a, that there is a defect of parties defendant; fifth, that separate causes of action against several defendants are improperly joined; sixth, the action was not brought within the time limit for the commencement of such an action, and seventh, that several causes of action are improperly joined. I may say we have

been and are now ready to submit that demurrer to the Court of Common Pleas at any time, and have so advised counsel for plaintiff in the court below.

Judge Lloyd: Did counsel request oral argument? Unless the rule is changed, as soon as the demurrer is filed and briefs with it, the court goes ahead and decides it on its own initiative.

Mr. Welles: There has been no brief filed on behalf of plaintiff and their time has not expired, but in the meantime, as the evidence will show, an attempt was made to go forward with these depositions. Now, in addition to the fact that, if we are correct in our position on the demurrer, the plaintiff has no legal capacity to sue and that there is no cause of action stated and that therefore there can be no material or relevant evidence of any sort obtained from any witness, therefore no witness can be required to answer any question. It further appears that, or will appear, that the notary public issued for the petitioner Bevan, who is the secretary and treasurer of The Woolson Spice Company, a subpœna duces tecum of a character which, under the authorities as we understand, constitutes an unreasonable search and seizure and which does not comply with the rule that requires reasonable description and specification of papers which it is sought to have produced by such subpœna. An example of the requirements of the subpœna is "all contracts and copies of contracts at any time entered into by you," this is in the Koehrman subpœna, "at any [fol. 146] time entered into by you for the purchase or sale of any corporate stock of The Woolson Spice Company"; and skipping through, for instance, No. 5 "All correspondence and copies of correspondence had by you with The Columbia Trust Company, New York, and/or its successors and/or any of its officers, agents and directors, including George E. Warren and Willard V. King from 1916 to 1932 inclusive". Regardless of the subject matter of the correspondence it is all required to be produced. And another one, No. 8, "Any and all correspondence and copies of correspondence with William A. Brigham, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan, Robert A. Stranahan, Thorlief Nielsen, John S. Sorenson, The Woolson Spice Company and S. P. Jermain, from 1916 to 1932 inclusive," regardless of the subject matter of such correspondence, so that it seemed to us and we so advised Messrs.

Koehrman and Bevan, Mr. Bevan's subpœna duces tecum was of a similar character, that under the law and the Constitution that they were not required to undertake to move their files bodily up to the law office of Messrs. Fraser, Hiett & Effler, and that the subpœna so far as it attempted to require the production of the papers was, in our opinion, void and until this court or some other court would otherwise rule they need not obey it. Now, as I say, the evidence will show that we appeared specially at the taking of the deposition of Mr. Bevan and saved all of our objections to the procedure, but he nevertheless did answer some questions. Certain questions he was advised he need not answer on the grounds which I have stated here, that the petition does not state a cause of action and plaintiff had no legal capacity to sue and the other grounds stated in the demurrer, that the subpœna duces tecum was illegal and void, and, accepting that advice, he declined to answer certain questions which, even if the petition did state a cause of action, I think under the rule laid down by this court in Poe v. Mathias, would be found to be wholly immaterial, and thereupon this order of commitment was issued. We think the evidence will show that the notary issued this order of commitment in the absence of the witness Bevan, in the absence of his counsel, without notice to counsel or [fol. 147] to Bevan, without opportunity to Bevan to be heard on the question as to whether he had committed a contempt or whether he was justified in refusing to answer the questions and produce the books and the notary purported to adjudge, using that word, that Bevan was in contempt and purported to adjudge that the questions asked him were material, as shown by the commitment papers signed by the notary himself. It will, as your Honors have seen at this time be our contention that there has been a violation of the constitutional rights of these plaintiffs both under the state statutes, numerous sections of which we will point out in our argument, under the fourteenth section of the Constitution of the United States, an attempt on the part of the notary to exercise judicial power, and the evidence will show that the notary has necessarily a pecuniary interest in attempting to force these witnesses to testify before him, since he is acting not only as notary but as stenographer and will get certain fees and compensation for writing the transcripts, and therefore he is disqualified

from undertaking to decide whether this man should be put in jail, under a decision of the United States Supreme Court in the Toomey case and other similar cases. Mr. Wall has reminded me that the evidence will also show that there has been no service of summons upon Marion M. Miller, one of the defendants, and that the attempted service of summons upon the Irving Trust Company as executor is void and ineffective as service against it as executor; that there has been no service of notice of the taking of these depositions upon the defendant Marion M. Miller and no real legal service of notice of the taking upon the Irving Trust Company as executor, and that, therefore, the case has not been placed in the posture required by the statutes for the taking of depositions, even though there were nothing else involved. I perhaps did indicate, but to make it clear, the opening statement is intended to apply to all three of the pending habeas corpus proceedings, Bevan, Stranahan and Koehrman, except in so far——

Judge Lloyd: I take it the questions involved are practically the same?

[fol. 148] Mr. Welles: I practically the same. There are one or two questions in the Bevan case arising by reason of the fact that some questions were asked him that do not arise in the Stranahan or Koehrman cases, otherwise the question is the same.

Mr. Fraser: Upon the last questions, if the court please, your Honors may want to consider this question, whether or not a witness who defies an order of a notary to appear and refuses to appear, and in answer to a subpœna appeared and refused to testify, anyway, whether that witness is in a position to raise these questions which Mr. Welles suggests. The only witness appearing was Mr. Bevan. Your Honors have observed from the statement of counsel this is a case involving a charge of an unlawful conspiracy entered into, secretly of course, by the defendants for the purpose of defrauding this estate. The petition is long in an attempt to set up the facts and after the statement of legal questions the facts are there and properly there under the authorities, we believe. We believe this plaintiff has a complete right and compelte legal capacity to file and maintain this suit. How far your Honors will feel justified, in view of the decisions of this court, in examining into the technical sufficiency of this petition which

is pending in the Court of Common Pleas and in which your Honors have no original jurisdiction to examine, will be discussed later as I have suggested. So far as the facts are concerned, on the sixth day of June a proper legal notice was served of the taking of depositions upon the thirteenth, was served upon counsel for these defendants who are now trying or appearing and who acknowledged service of that notice, and who appeared on the thirteenth with a witness Bevan. They were served with summons originally in the case on the second of June. Because of the fact that certain allegations in this petition for habeas corpus, the court should be advised that upon the original notice served and original subpœnas the defendants, in order to frustrate us in the taking of depositions, applied to the Common Pleas Court for an injunction, their main contention being, as I understand, they wanted time to prepare the case, on the sixth of June. On the sixth of June an agreement was [fol. 149] made, a verbal agreement, that the depositions would be taken on the thirteenth. Thereupon new notices were served on Monday, the sixth, acknowledged and on the seventh, after service of those notices the subpœnas were served on the defendants.

Judge Lloyd: Is this suit an action for damages or a suit in equity?

Mr. Fraser: Suit in equity, I rather think it is. It is a suit with alternative relief prayed for.

Judge Lloyd: If it is a suit in equity you could have a bill of discovery.

Mr. Fraser: That is doubtful under the Fairchild case. That case deals with the other question we have here, matter of materiality and matter of properly questioning—at any rate we have a legal right under the law, statutory right to take these depositions, and we think these gentlemen have no power to nullify that right. We think the court will be satisfied that these questions put to Mr. Bevan were material on the issues as presented in the petition. The subpœna duces tecum, to illustrate, we tried through Mr. Bevan, secretary and treasurer of the company, to produce the minute book. If that is not a correct description of the book, I don't know what is. He went on the stand and testified that he did have it but had turned it over to his counsel. Where it was now he didn't know.

When he was on the stand we discovered that. Whether we will ever get the book, we don't know. We asked for the record of stock transfers, which are most material to this situation, this whole deal, as all these deals are, was concocted and carried out in the dark, with the lights all out, as these gentlemen always work, and work in secret, we wanted to find out what the minutes of this company showed, so I asked, we asked for the production of the minute book and it appears in the testimony of Bevan that there is one, but where it is we do not know, it was in his possession until the filing of this suit and he says it was turned [fol. 150] over to his counsel. We asked for the production of the record of the payment of dividends since this time when we say this stock was fraudulently acquired and transferred. We asked for the record of the company showing the transfers of stock. It is obvious that this deal or transfer had been indirect and through many hands. That is the way those things are usually done, and we are entitled to know how. This man has testified that there are such records. In the subpœna duces tecum we only have to describe the document so the witness may know what is wanted and what is meant. If there is anything in the subpœna he doesn't know and can't ascertain the identity of, that can be taken care of when it is reached. In this examination of Mr. Bevan we tried to have him produce these things designated, which are perfectly plain. No one can doubt their identity. He refused to produce them under the advice of counsel. We believe, if the court please, under the authorities this is the rule which your Honors will apply, that if there is any reasonable probability or possibility, as some of the courts say, these matters being material in this case, the court will not deny us the right to ascertain those facts, even though it does involve the cross examination of a defendant. The statute was passed for that purpose and as the Supreme Court has said in many cases, particularly in the Fairchild case, we can not be required to wait until they are satisfied the time has arrived for our finding out these facts. It is a valuable right given by the statute and we insist now it is two weeks after the filing of the petition. They have secured that much delay and we are entitled to proceed in the examination of these people and ascertain the facts and ascertain other evidence. Now, there is an allegation here for example, made

in the supplement, that Mr. Purcell is not disinterested. No answer, I think is filed, and I understand it is not necessary to file an answer. That allegation of course we challenge. They make a challenge that our effort wasn't in good faith, to take testimony. That allegation is challenged, and proof will be offered. But if your Honors' practice is to exclude evidence challenging and disproving allegations of that kind, somebody must have the right to file an answer. The suit as filed here is not plaintiff and defendant, as may be done, it is filed ex parte John Smith, ex parte Koehrman, and the sheriff produces the body and the return and shows why he is holding these men. [fol. 151] Whether the sheriff has any right—he denies this charge of bad faith, he denies the officer was not authorized.

Mr. Welles: It is agreed in the Stranahan case that Mr. Robert A. Stranahan, the petitioner, would, if called as a witness, testify that he is in good health and that he expects to be present at the trial of this case if and when the case is tried on the merits.

Mr. Fraser: We make that stipulation notwithstanding the fact that on Monday Mr. Welles said Mr. Stranahan was ill and not feeling well.

Mr. Welles: As far as I know, that is the only thing we have been able to agree upon since this trial started.

Mr. Fraser: We can agree upon this, if the court please, that no service of summons has been made on Marion Miller. He is in California, and service here was residence service only and whether it was made, I don't know.

Judge Richards: Is he a necessary party?

Mr. Fraser: No.

Judge Richards: Is the Irving Trust Company?

A. No, I think not. But they have been served. Not only that, but have entered their appearance by acknowledgment of the deposition notice.

Mr. Wall: The sheriff's return on Miller shows "not found".

Mr. Fraser: Very well.

Mr. Welles: I understand you agree there has been no service on Marion Miller, either by summons or notice to take depositions?

Mr. Fraser: Yes, sir. And depositions when taken, we concede can not be used against the man who didn't have notice, but may be used against those served. These stipu-

lations are made reserving our objections and exceptions to their materiality.

OFFERS IN EVIDENCE

Mr. Welles: Any offer of evidence as made by us is subject to our objection that there is not sufficient showing by answer or return from the sheriff showing legal custody of any of the petitioners. We do offer in evidence the petition in the case of Clara Sieleken Schwarz v. The Woolson Spice Company, and in order to avoid encumbering the [fol. 152] record further, if it is satisfactory, the copy attached to the amendments to the habeas corpus proceedings may be considered in evidence.

Mr. Fraser: It is also attached to the return of the sheriff. We do not object on the ground of identification.

Judge Lloyd: You may have your exceptions.

Mr. Welles: Without objection as to lack of certification?

Mr. Fraser: Yes.

Mr. Welles: We offer copy of the demurrer filed by defendant Franklin H. Biggs in the case of Schwarz v. Woolson Spice Co.

Mr. Fraser: Note an objection on the ground of materiality.

Mr. Welles: And marked Plaintiff's Exhibit No. 2, the petition should be marked Exhibit No. 1. In the Bevan case we offer in evidence the copy of the commitment which is attached to the petition, and which may be marked Exhibit No. 3A. We also offer the copies of the writs of attachment which are respectively attached to the petitions in the Stranahan case and in the Koehrman case, and which are marked Exhibit 3B and 3C respectively.

Mr. Fraser: The originals of those are likewise attached as a part of the sheriff's return of the writ of habeas corpus. Are those marked?

Mr. Welles: Those should be numbered in their own cases. We offer in evidence in each of the three cases Exhibit No. 3, which is a copy of the authority of the Irving Trust Company of New York to do business in the State of Ohio. If it is agreeable to counsel we will use a certified copy of it in one case and copies of that in the others.

Mr. Fraser: We are objecting to Exhibit No. 3 on the ground that The Irving Trust Company has already entered its appearance here.

(Overruled; exception.)

Mr. Welles: We also offer in evidence in each of the three cases Exhibit No. 4, which is a certified copy of the instrument filed by The Irving Trust Company with the secretary of state showing its authorized powers and the location of its office in this state and the name of its local representative, etc. We shall offer a certified copy in one case and copies of that in the others, if there is no objection.

[fol. 153] Mr. Fraser: Note our objection and exception.

Mr. Welles: We now offer in evidence in the Bevan case the subpœna duces tecum which was served on Mr. Bevan, marked "Plaintiff's Exhibit No. 7", in the Koehrman case the subpœna marked "Plaintiff's Exhibit No. 8", and in the Stranahan case the subpœna which was served on Mr. Stranahan, marked "Plaintiff's Exhibit No. 9", copies of each being attached to the original petitions for habeas corpus.

Mr. Fraser: Referring to the subpœnas served on the seventh of June?

Mr. Welles: Yes, the ones attached to the petition. No objection to the use of copies, is there?

Mr. Fraser: Not at all.

Mr. Welles: I would like to call Mr. Purcell the notary public.

Thereupon, WILLIAM PURCELL, being first duly sworn, testified as follows:

Direct examination.

By Mr. Welles:

Q. Your name is William Purcell?

A. Yes, sir.

Q. Live in Lucas county, Ohio?

A. Yes, sir.

Q. Notary Public of that county?

A. Yes, sir.

Q. You are the William Purcell who issued the writ of commitment for C. N. Bevan and writs of attachment for Robert Stranahan and Koehrman?

A. I am.

Q. In the case of Schwarz v. Woolson Spice Company?

A. Yes, sir.

Q. Were you employed by somebody to act as notary and take or attempt to take depositions?

A. Yes, sir.

Q. Who employed you?

A. The firm of Fraser, Hiett, Wall and Effler directly.

Q. The same firm who are of counsel for Clara Sielcken Schwarz in the case mentioned?

A. Yes, sir.

[fol. 154] Q. Is it a fact that you originally signed subpœnas for Mr. John W. Koehrman and Mr. C. N. Bevan and Mr. Stranahan, directing them to appear before you to give testimony and produce books and papers, at a time when no petition in the case of Clara Schwarz v. Spice Company had been filed?

(Objection.)

Mr. Fraser: The notice which they acknowledged was upon the sixth of June, there was an earlier notice served on the day the case was filed, which was questioned before Judge Gosline on the sixth of June and at that time new notices were drawn and served.

Mr. Welles: I thought in view of some of the things Mr. Fraser had said about the history in the Court of Common Pleas——

Judge Lloyd: I don't think we are getting on——

Mr. Welles: Very well. Did you receive from anybody any acknowledgment or proof of service of notice of the taking of depositions before you set for June 13, 1932, in the cause of Schwarz v. Woolson Spice Company?

A. Yes sir.

Q. Do you have that with you?

A. No, sir.

Q. Do you have it there, Mr. Fraser?

Mr. Fraser: Yes.

Mr. Welles: May I see it. Now, Mr. Purcell, I show you a paper marked Plaintiff's Exhibit No. 6, is that the acknowledgment of service of notice of the taking of depositions just referred to by you?

A. Yes, sir.

Q. Have you any other acknowledgment of service of notice than that, referring to the June 13th proceedings?

A. No, sir.

Q. You have no return of service of notice of the taking of these depositions upon Irving Trust Company, executor?

A. None other except just this.

Q. Or upon Marion M. Miller?

A. No, sir.

Q. Neither one?

A. No sir

Q. Have you any acknowledgment or proof of return or service of this notice or any notice upon Mitchell and Eastman? (No answer.)

[fol. 155] Q. Mr. Purcell, I show you a copy of the subpœna duces tecum, which is attached to the original petition for writ of habeas corpus filed by C. N. Bevan, is that a copy of the subpœna duces tecum issued by you for Mr. Bevan?

A. I can't tell, Mr. Welles.

Q. Have you produced the original Bevan subpœna signed by you?

A. It wasn't given to me, sir. It was introduced in evidence. It was referred to but not marked as an exhibit at the taking of the deposition.

Q. Was it left in your possession?

A. No, sir.

Q. I show you paper marked Exhibit No. 7, is that the original subpœna signed by you for Mr. Bevan?

A. Yes, sir.

Q. Dated the seventh of June?

A. Yes, sir.

Q. Did you prepare that subpœna, or did counsel for plaintiff prepare it?

A. Counsel prepared it.

Q. Counsel prepared it for you?

A. Yes, sir.

Q. I show you the commitment addressed to Joseph Zimmerman, sheriff directing him to arrest and commit C. N. Bevan to the jail of Lucas County, being a paper which is attached to the sheriff's return in the Bevan case, did you sign that commitment?

A. Yes, sir.

Q. Did you give Mr. Bevan any notice before you signed it that you were going to sign it?

(Objection; overruled; exception.)

A. No, sir.

Q. Did you give counsel for Mr. Bevan any notice that you were to sign a commitment for Mr. Bevan?

(Objection; overruled; exception.)

A. Yes, sir.

Q. Isn't what you said this: that if a commitment was presented to you, you would sign it?

A. No, Mr. Welles, I believe I said that I was going to sign one but I didn't think I would get it into the hands of the sheriff before morning.

Q. You gave counsel for plaintiff no notice of the time and place when you were to sign the commitment?

A. Counsel for plaintiff?

[fol. 156] Q. Counsel for Bevan?

A. Not of the exact time.

Q. Nor of the place? Now, in your commitment appears the following: "As appears in the foregoing transcript of said proceedings, the said Bevan then and there refused to answer as hereinbefore set forth, and for the reasons therein stated, and the undersigned, a notary public, in each instance ordered the said witness to answer which he refused to do; and the undersigned, a notary public, then and there for the said contempt of the said C. N. Bevan, in refusing to answer each question, and refusing to produce said books, papers and documents, ordered and adjudged that he be imprisoned in the county jail until he submit to testify in the premises." Now, isn't it a fact, Mr. Purcell, that at the time Mr. Bevan was present at the taking of his deposition, at the time he refused to answer questions, that you then and there adjudged that he was in contempt and ordered that he be committed?

(Objection; overruled.)

A. No, sir, I didn't at the exact moment.

Q. It was some hours later that you signed this commitment, wasn't it?

A. It was immediately at the conclusion of the taking of the depositions that commitments were decided upon and gotten up.

Q. It was some hours after Mr. Bevan had left the office before you signed this commitment?

A. Yes, sir.

Q. And you had no hearing, heard no arguments, received no evidence on the question as to whether Mr. Bevan was in contempt or whether he had any justification or reasonable ground for refusing to answer?

(Objection; overruled; exception.)

A. No, sir.

Q. You served upon Mr. Bevan no notice, either verbal or in writing, of any charge which you were making against him, before you signed this order for his commitment?

(Objection; overruled; exception.)

A. No, sir.

[fol. 157] Mr. Fraser: May I have objections and *objections*, without interrupting?

Judge Lloyd: Yes, you may.

Mr. Welles: Your commitment further reads: "The undersigned, a notary public, adjudges that said questions and said books, papers and documents therein referred to are material to the issues in said cause as appears from the petition filed herein, copy of which is hereto attached and marked Exhibit A"; did you in fact hold any hearing, hear any arguments, give counsel for Mr. Bevan or for the defendants in the Woolson case any opportunity to be heard by you on the question as to whether these documents or questions were material to the issues?

A. No, sir.

Q. Did you in fact even read the petition in the Woolson Spice case?

A. Yes, sir.

Q. Are you a lawyer?

A. No, sir.

Q. Did you undertake to form a deliberate judgment upon the legal question as to whether the questions asked were material to the issues raised by the petition in the Woolson case?

A. No, sir.

Q. You simply signed the paper presented to you by counsel for the plaintiff in that case, is that right?

A. Yes, sir.

Q. I show you paper marked Plaintiff's Exhibit No. 8, is that the original subpœna signed by you under date of June 7th for John W. Koehrman?

A. Yes, sir.

Q. It is a fact that because Mr. Koehrman did not appear before you on June 7th that you then signed and delivered to the sheriff a writ of attachment, the original of which appears as a part of the sheriff's return?

(Objection; overruled; exception.)

A. No, sir.

Q. At whose request did you sign the writ of attachment for Mr. Koehrman, which is a part of the sheriff's return?

A. At the request of Mr. Fraser.

Q. What was the reason for signing it?

A. Because he didn't appear on the thirteenth day of June.

[fol. 158] Q. Is it a fact, Mr. Purcell, that on the morning of June 13, 1932, after you had undertaken to begin these depositions, that I stated before you, as shown by your transcript, without waiving any rights or submitting themselves to the jurisdiction of the notary, Mr. Koehrman will come over here and meet with you gentlemen whenever you are through with Mr. Bevan, who is now here?

A. Yes, sir.

Q. And was there, to your knowledge, any request thereafter made that Mr. Koehrman should come over that afternoon?

A. There was a request made that I issue an order of attachment immediately for Mr. Koehrman.

Q. You issued the order of attachment immediately upon that statement being made?

A. At the conclusion of the depositions.

Q. You didn't issue it right that morning, then?

A. Yes, sir.

Q. You didn't issue it right that morning then?

A. Yes, sir. As soon as we took the recess until afternoon.

Q. You issued the attachment for Mr.——

A. I am sure the attachment was in the hands of the sheriff before eleven thirty a. m.

Q. As far as you know, no further request was made that Mr. Koehrman should come there, except as you un-

dertook to enforce his attendance by this writ of attachment?

A. Yes, sir.

Q. Is this Exhibit No. 9 the subpœna which you issued for Robert A. Stranahan?

A. It is one of the subpœnas.

Q. That is the one dated June 7th?

A. Yes, sir.

Q. Is the writ of attachment which is attached to the sheriff's return and marked Plaintiff's Exhibit No. 10 in the Stranahan case here, is it the one which you issued for the arrest of Mr. Stranahan?

A. Yes, sir.

Q. We offer in evidence each and all of the exhibits which have been called to the attention of Mr. Purcell, making an offer of each one separately.

(Objection; exception.)

Q. You were employed not only as a notary public but [fol. 159] also as a stenographer in the taking of these depositions of these three men whose petitions for habeas corpus are here, were you not?

A. Yes, sir.

Q. And you were acting as both notary and stenographer?

A. Yes, sir.

Q. Is it a fact that the amount of your compensation as a stenographer taking these depositions is dependent upon the number of pages of your notes which you transcribe and deliver to counsel for plaintiff?

A. Dependent upon the number of pages which we transcribe and deliver to all counsel.

Q. To any counsel, including counsel for the plaintiff?

A. Yes, sir.

Q. Do you receive any per diem as notary from counsel?

A. No, sir.

Q. Have no arrangement of that sort?

A. No, sir.

Q. Your compensation is contingent on the extent to which they testify before you?

A. Yes, sir.

Q. And the extent to which you transcribe the testimony, including the exhibits?

A. Yes, sir.

Q. And your employment as stenographer was by Messrs. Fraser, Hiett, Wall & Effler?

A. Yes, sir.

Q. In the taking of these depositions, I mean?

A. Yes, sir.

Q. What is your rate of compensation per page of typewritten transcripts of depositions or exhibits?

A. Based on the number of words. Twenty-five cents a hundred words, based on the statute.

Q. For the original copy?

A. Yes, sir.

Q. And you make a charge for furnishing carbons?

A. Yes, sir.

Q. What rate?

A. The party ordering the original pays for their carbon copy ten cents a folio and opposing counsel pays fifteen cents.

Q. Were you in fact directed by Mr. Fraser or one of his firm to prepare an original typewritten transcript of these depositions?

A. I was directed to transcribe the testimony.

[fol. 160] Q. In typewriting?

A. Yes, sir.

Q. And to deliver how many copies to his office?

A. Deliver one carbon to his office and one carbon to Mr. Jackson.

Q. What were you to do with the original?

A. The original I took it for granted is to be kept in my office until signed and filed.

Cross-examination.

By Mr. Fraser:

Q. Mr. Purcell, before this morning, at any time in the proceedings, was any objection made by counsel for these defendants to your competency or qualifications?

A. Not to me.

Q. In your hearing?

A. Not that I know of.

Q. At the time of the taking of the testimony was anything said by Mr. Welles or any of counsel for defendants

in any way questioning your qualifications or fairness or ability?

A. No, sir.

Q. In addition to employment by us to transcribe this testimony, were you also employed by counsel for the defendants to furnish them certain copies?

A. Yes, sir.

Q. Has that been done?

A. Yes, sir.

Q. Except to be paid by them for these copies?

A. Yes, sir.

Q. Practice in the taking of depositions is this, is it not, a deposition is taken and certain fees are taxed for the taking of the original?

A. Yes, sir.

Q. And returned and taxed as costs in the case and in many instances the counsel calling you advance those costs to you?

A. Yes, sir.

Q. Has that been the universal practice?

A. Yes, sir.

Q. How long have you been engaged in this work?

A. Sixteen years.

Q. Before issuing any of these writs of arrest or commitment, did you or did you not consult one of the judges of the Common Pleas Court of this county?

A. Yes, sir.

[fol. 161] Q. Which judge?

A. Judge Gosline.

Q. Were the writs issued after consultation with him?

A. Yes, sir.

Q. At the time that you were shown and had knowledge, personal knowledge of the original deposition notice served upon and acknowledged by Tracy, Chapman & Welles, were you told by me that service was also being made upon the Irving Trust Company's agent in Toledo?

A. Yes, sir.

Q. Were you also told that the original notice would be in the mail the next day?

A. I don't recall that.

Q. You never have seen that original notice?

A. No, sir.

Q. Acknowledged by them?

[fol. 162] Redirect examination.

By Mr. Welles:

Q. You don't mean that you filed any formal application with the Court of Common Pleas for instructions or advice as to whether you should issue these writs of attachment or commitment?

A. No, sir.

Q. You didn't give counsel for defendant an opportunity to be heard and present any views they had as to why attachment or commitment should not issue?

A. No, sir.

Q. You simply went over and told Judge Gosline in substance that Mr. Fraser had asked you to issue writs of attachment or commitment or both and that because there was an application for injunction pending before him you wanted to find out whether it was all right to issue such writ?

A. In substance, that is it.

Q. He said, in substance, that the mere pendency of the application did not amount to one and you were at liberty to perform whatever your duties were in the premises?

A. Yes, sir.

Judge Williams: Was an attachment issued for the two witnesses who did not appear?

A. Yes, your Honor.

Q. And arrested under the writ of attachment?

A. Yes, your Honor.

Witness dismissed.

Mr. Welles: May it be conceded that Mr. Bevan, if called as a witness, would testify that he is in good health and expects to be present at the trial of the case of Clara Sieleken Schwarz v. The Woolson Spice Company in the Court of Common Pleas if and when it is tried, and resides in this county.

Mr. Fraser: Yes, I think he will testify to the same subject matter in his deposition, of course with our reservation of objection.

Mr. Welles: And the same thing as to Mr. Koehrman?

Mr. Fraser: Yes, with the same reservation.

Mr. Welles: We offer in evidence the several stipulations with respect to what the petitioners would testify to on these subjects.

[fol. 163] Mr. Fraser: Mr. Welles, will you stipulate that the young man who served this notice would testify that it was served upon Mr. Dexter, the man who appears to be the authorized agent of the Irving Trust Company?

Mr. Welles: You say you have a letter saying this was handed to Mr. Dexter?

Mr. Fraser: I have a statement over the telephone that this was served upon Mr. Dexter and he signed it, placed his signature on there acknowledging service.

Mr. Welles: I think we ought to have him here.

Mr. Fraser: I will make my professional statement that as soon as we can we will call him, bring evidence to show that. Mr. Welles, you don't question the signature of your firm appearing upon the original notice?

Mr. Welles: No.

Mr. Fraser: Exhibit No. 6.

Mr. Welles: No.

Thereupon Raymond T. Jackson, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fraser:

Q. Your name, please?

A. Raymond T. Jackson.

Q. You are a lawyer, Mr. Jackson?

A. Yes, sir.

Q. Member of what firm?

A. Member of the firm of Baker, Hostetler, Sidlo & Patterson of Cleveland.

Q. Their offices in the Union Trust Building?

A. Yes, 1956 Union Trust Building, Cleveland, Ohio.

Q. Have you been active in the preparation and filing of this law suit?

A. I have.

Q. And did you take part in the preparation of the various notices and subpœnas for depositions in this case?

[fol. 164] A. Well, I was in contact with the preparation and was asked to see that the notices be prepared. As far

as our firm was concerned the work was physically done by Mr. Morley in cooperation with your office.

Q. Are you in a position to testify whether or not these depositions are being taken in good faith or in bad faith?

(Objection; overruled; exception.)

A. I am.

Q. What is the fact?

(Objection; overruled; exception.)

A. The depositions are being taken in good faith.

Q. What is the fact as to whether or not they will or will not be used in the trial of this Schwarz case?

(Objection; overruled; exceptions.)

A. Depositions are being taken with the intention that they shall be transcribed and filed in the Common Pleas Court of this county and that the depositions will be used by the plaintiff if any occasion under the statute should arise which will permit their use and if the witnesses, particularly those called for cross examination under the statute, testify to the truth.

Cross-examination.

By Mr. Welles:

Q. Mr. Jackson, it is a fact, is it not that the proposition has been made to you several times by counsel for certain of the defendants, including the three petitioners here, that you should agree that the demurrer in the Court of Common Pleas should be first heard before a deposition should be taken, so that we might know whether there is any right on anybody's part to take anybody's deposition?

A. I don't know whether any proposition of that kind exactly was made. I can state the facts as I understand [fol. 165] them, if you want me to do it.

Q. I would like to have you state whether, in substance, the suggestion was not made that we should hear the demurrer before taking the depositions?

A. I will say this, that counsel for the defendants sought an agreement to postpone the taking of the depositions until——

Mr. Welles: I object to his rambling around here and go into an irrelevant controversy in which he can make this speech he is trying to make.

A. A suggestion was made.

Q. You say it was made, a suggestion was made by me to you?

A. Yes.

Q. And declined by you?

A. That is right.

Q. And is it not a fact that we stated to you that we were willing to submit that demurrer immediately, at any time suiting the court's convenience and your convenience?

A. You so stated yesterday to me, Mr. Welles.

Q. Didn't we say, so state, at the time we were before Judge Gosline that we were intending to file a demurrer which we would submit?

A. You stated you intended to file a demurrer before Judge Gosline on June 6th and that you would be glad to expedite the hearing of the motion when and if it should be filed.

Q. It is a fact, is it not Mr. Jackson, that you first attempted to take these depositions by means of serving with the summons a notice to take depositions?

A. Well, they were served the same day. My understanding is that the summons were served first, I wasn't there.

Q. But they were entrusted to the sheriff to be served at or about the same time?

A. My understanding is that after the summons had been issued in the suit and delivered to the sheriff of this county, he was then given notice of taking depositions and certain subpœnas and directed to serve them in a certain way, first [fol. 166] the summons and then the notices and then the subpœnas. I wasn't here but that is my understanding.

Q. They were to be served upon the defendants direct, not upon counsel?

A. That is right, no counsel had appeared for them Mr. Welles.

Q. And they were served with or at approximately the same time, the subpœnas duces tecum, on the witnesses Bevan and Koehrman?

(Objection.)

Q. In order to shorten the thing, may it be admitted that the first attempt to take depositions in this case by plaintiff consisted of causing to be served upon certain of the defendants on the same day the summons was served upon those defendants, a notice to take depositions, service being made upon the second of June and notice to take depositions for the sixth of June, and that upon Bevan and Koehrman there were served by the sheriff at or about the same time, at least on the same day, subpœnas duces tecum for the production of books and papers before the notary on June 6th.

Mr. Fraser: If that stipulation includes the service on the Irving Trust Company in substantially the same way, yes. I understand the order was first, service of summons upon the resident defendants, then notices to take depositions and in the instance of Mr. Bevan, who is not a defendant, he was served with a subpœna duces tecum after the summons on the defendants had been served and notices to take depositions. In Koehrman's, he was served first with summons, then with notice to take depositions, then with a subpœna duces tecum. This stipulation is made with the reservation.

Mr. Welles: There is no stipulation, then, because Mr. Fraser's additional language is quite contrary with what has been found in the Court of Common Pleas, and we can not agree with it. We will be glad to have the sheriff called and present the exact facts, but we do not think it is material.

[fol. 167] Judge Lloyd: And we agree with you.

Mr. Fraser: Mr. Jackson, referring to the cross examination with respect to any agreement made on June 6th with respect to hearing or taking depositions and filing and hearing of the demurrer, tell the court the substance of that talk?

(Objection; overruled; exception.)

A. On June 6th at the hearing before Judge Gosline it was suggested that the hearing of that pending motion be continued, and asked counsel if they could not agree on some method of going forward and in talking with Mr. Welles after the suggestion from Judge Gosline, I stated that we would be willing to postpone the consideration of

the pending matter and go forward on the following Monday, June 13th, taking the depositions at Mr. Fraser's office that date having been suggested in conference by Judge Gosline. Mr. Welles asked for some time to confer with some one and then told me that that date would be acceptable and that no objection would be made that any demurrer was pending if the one should be filed, or any exceptions taken to the taking of the depositions, and with that conversation we said we would issue the new subpœnas and notices which are the ones involved in this proceeding.

Motion to strike out answer as irrelevant, overruled, exception.

[fol. 168] Thereupon GEORGE D. WELLES testified as follows:

Mr. Wall: Will you state the substance of the conversation between you and Mr. Jackson on June 6th, regarding the time of taking the depositions?

A. Judge Gosline suggested a recess, and then invited us into his room and suggested we agree upon some date for taking these depositions. He finally said it ought to go about a week, he thought. I told him, and Mr. Jackson was present, that we would consider it and let him and Mr. Jackson know. We did consider and consult and my arrangement with Mr. Jackson was this. I said to Mr. Jackson, in substance, that obviously we must preserve any rights we had to object to these depositions, but whether there was a delay or whether there was not a delay, we would waive no rights, we were going to rely upon every right we had and expected to file a demurrer, and that we expected to rely upon the fact that there was a demurrer pending. Mr. Jackson said to me, in substance, "Does that mean you will object to the witnesses testifying at all, that you won't let them testify at all on the ground you have a demurrer pending?" and I said we wouldn't waive that objection, but these two witnesses, Koehrman and Bevan will appear and will submit to answering some questions, what questions or how many I wouldn't now say, but we shall reserve all rights. I afterwards went back to Mr. Jackson, before we went, a moment or two afterwards, and said to him I didn't want any misunderstanding about this,

"I want you to understand we will waive no objection that we have."

Mr. Fraser: My statement as to what occurred there is in the depositions and on file. I don't think it is at all material.

Mr. Welles: If Mr. Fraser's statement is considered, I want Mr. Wall's statement considered also, if it is to be material.

Thereupon the court recessed for the noon hour, to reconvene at 1:30 o'clock p. m.

Mr. Welles: With the court's permission we would like [fol. 169] to reopen our evidence for the purpose only of offering one New York Court of Appeals decision and a section of the New York statutes which we think bear upon the subject.

Judge Lloyd: Very well, you may put it in.

Mr. Fraser: Subject to our objection.

Mr. Welles: Your objection isn't because we are not proving the New York statute by some New York attorney?

Mr. Fraser: No.

Mr. Welles: We offer in evidence the opinion of the Court of Appeals of New York in the case of Harrington, Admr., etc., respondent, v. Eugene M. Keteltas, et al., appellants, 92 New York, beginning at page 40 and ending on page 50, called Exhibit No. 11, and we also offer from the New York Civil Practice, Cahill, 1927, the following subsection 5 of Section 20 of the Surrogate's Court Act.

Mr. Fraser: Objection and exception.

Mr. Welles: You aren't objecting to the manner of proof?

Mr. Fraser: No.

Mr. Welles: "The Surrogate in or out of court as the case may be has power: 5. To require by order an executor, administrator, testamentary trustee or guardian, subject to the jurisdiction of his court, to perform any duty imposed upon him by statute or by the surrogate's court under authority of the statutes."

Thereupon Raymond Adamski, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fraser:

Q. What is your name, please?
A. Raymond Adamski.
Q. Where do you live?
A. 2601 Tate Avenue, Cleveland, Ohio.
Q. Are you employed somewhere?
A. Yes, sir.
Q. Where?
A. Law firm of Baker, Hostetler, Sidlo & Patterson.
[fol. 170] Q. What is your job?
A. Messenger.
Q. How long have you been there, how long have you worked there?
A. About a year and a half.
Q. Raymond, I show you paper which has been marked Defendants' Exhibit No. 1 in this case, did you ever see that?
A. Yes, sir.
Q. In connection with your work in Cleveland? Where did you first see it?
A. Mr. Morley handed it to me and told me to serve it on Mr. John Dexter.
Q. How many copies did he give you?
A. One original and one copy.
Q. Where did you go with them?
A. To the Society for Savings Bank Building.
Q. Whom did you inquire for?
A. I went to the guard at the Society for Savings Bank and asked for Mr. John Dexter. He told me there was a bank meeting and he would not be back until twelve, so I waited until about 12:15 and decided I would go to lunch and come back and catch him in, and I came back, I think it was about one o'clock, and I was just a few minutes late, he had gone out to lunch, and I went back and told Mr. Morley and said I would stop in and catch him on my way to court, and I went to his office then and the guard told me he was in and he pointed Mr. Dexter out to me and told me to go right over to him, so I went over to him and handed him the papers. At first I addressed him as Mr. Dexter, is this Mr. Dexter and he said yes and I handed

him the papers. He looked them over and examined them and I told him to sign the copy and keep the original.

Q. Did he sign the copy?

A. Yes, sir.

Q. Did you see the name, J. H. Dexter; was that put on in your presence, Raymond?

A. Yes, sir.

Q. By whom was it signed?

A. By John H. Dexter.

Q. Was that all that occurred at that time?

A. Yes, sir.

Q. You left with him the original?

A. Yes, sir.

Q. And brought this with you and returned it to the office?

A. Yes, sir.

[fol. 171] Q. Since serving that paper, have you taken any steps to be more sure that it was Mr. Dexter who signed the paper?

A. Mr. Reeder took me down yesterday afternoon and introduced me to Mr. Dexter and it was the same man I served. He admitted it and said "Are you the young man who served the papers?" and I said I was.

Witness dismissed.

COLLOQUY

Mr. Fraser: There are three papers I wanted marked as exhibits. If your Honors please, I offer in evidence a copy of Exhibit No. 4, being the original summons and return of the sheriff of Cuyahoga county of service upon the Irving Trust Company. For the sake of the record, if one is to be made, we desire to substitute a copy. And Defendants' Exhibit No. 3, which is a certified copy of the annual report returned to the Tax Commission of Ohio by the Irving Trust Company for 1931, certified over the signature of the secretary.

(Objection; overruled; exception.)

Mr. Fraser: And Defendants' Exhibit No. 2, which is a certified copy of the report rendered by the Irving Trust Company to the same body for the year 1932.

(Objection; overruled; exception.)

Mr. Welles: On the hearing yesterday, as I recall it, early in Mr. Purcell's examination I asked him in substance whether it wasn't a fact that he had signed the first set of subpœnas for the witnesses before the petition had been filed or any summons served, that is those calling for their appearance on June 6, 1932, and the court at that time ruled that that was immaterial and I don't think I made an offer to prove. I should like to offer to prove that if permitted to answer he would say he signed these subpœnas before the petition was filed or summons issued.

Judge Lloyd: If I remember correctly, you stopped by saying you didn't think it was material and as I remember I said we agreed with you, and with that it was dropped. We want you to have in whatever you think you should have in here.

[fol. 172] Mr. Welles: Perhaps counsel can stipulate.

Mr. Fraser: Reserving our objection to the materiality, we stipulate that he would so testify.

Mr. Welles: And it is agreed that any evidence offered by either side in any one of the three cases shall be considered as having been offered in all three cases.

Mr. Fraser: Subject to the same objections.

Plaintiff and defendant rest.

The foregoing, together with the exhibits hereto attached, namely, Plaintiff's Exhibits Nos. 1, 2, 3, 3a, 3b, 3c, 4, and 6 to 11, inclusive, and Defendants' Exhibits Nos. 1 to 4, inclusive (no exhibit being numbered 5 and no exhibit number 5 being offered by either party or received in evidence), contains all the evidence given, offered or received by the court on the trial of the above-entitled action and proceedings.

Thereafter on the twenty-second day of June, 1932, the court found and adjudged in favor of the defendant and respondent, Joseph Zimmerman, as sheriff of Lucas county, and against the petitioner, and ordered the writ of habeas corpus issued herein discharged and the petitioner remanded to the custody of the respondent, to all of which petitioner in open court objected and excepted. Within three days thereafter petitioner filed in this court his written motion for a new trial of this cause, for the reasons therein set forth. Said motion having thereupon come on for hearing and having been argued and submitted to the court, was overruled by the court; to which action and or-

der of the court overruling his said motion, petitioner in open court, duly excepted.

ORDER SETTLING BILL OF EXCEPTIONS

And now comes the petitioner, by his counsel, and presents to the court this, his bill of exceptions, taken at said trial of said cause, and prays that the same may be settled, allowed, signed and sealed by the court, and ordered made a part of the record in said cause; all of which is accordingly done on the twenty-third day of June, A. D. 1932.

Harry W. Lloyd, Presiding Judge; S. S. Richards,
Roy H. Williams, Judges, Court of Appeals.

[fol. 173] Received this bill of exceptions on this twenty-third day of June, A. D. 1932.

Harry W. Lloyd, Presiding Judge; S. S. Richards,
Roy H. Williams, Judges, Court of Appeals.

[fol. 174] STATEMENT RE PLAINTIFF'S EXHIBIT 1

Plaintiff's Exhibit 1 (petition in case of Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company et al., defendants) appears in full at pages 110 to 131, supra, in this Transcript and is here incorporated by reference thereto as fully as if repeated verbatim.

[fols. 175 & 176] PLAINTIFF'S EXHIBIT 2

IN COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 131,925

CLARA SIELCKEN-SCHWARZ, Plaintiff,

vs.

THE WOOLSON SPICE COMPANY et al., Defendants

DEMURRER OF THE DEFENDANT FRANKLIN H. BIGGS

Now comes the defendant Franklin H. Biggs and demurs to plaintiff's petition on the ground that it appears on its face:

1. That the plaintiff has not legal capacity to sue;

2. That the petition does not state facts which show a cause of action;

3. That there is a misjoinder of parties defendant;

4. That there is a defect of parties plaintiff;

4-a. That there is a defect of parties defendant;

5. That separate causes of action against defendants are improperly joined;

6. That the action was not brought within the time limited for the commencement of such actions;

7. That several causes of action are improperly joined.

Marshall, Melhorn, Marlar & Martin and Tracy, Chapman & Welles, Attorneys for said Defendant.

[fols. 177 & 178] PLAINTIFF'S EXHIBIT 3

"Certificates of qualification under Ohio General Code Sections 178 and 183 issued to The Irving Trust Company by the Secretary of State of Ohio, March 28, 1930." Omitted in printing.

[fol. 179] PLAINTIFF'S EXHIBIT #3A

(Notary's Order of Commitment of C. N. Bevan)

PLAINTIFF'S EXHIBIT #3B

(Notary's Writ of Attachment of Robert A. Stranahan)

PLAINTIFF'S EXHIBIT #C

Plaintiff's Exhibit #3C (Order of attachment of appellant, John W. Koehrman) appears in full at pages 105 to 106, supra, of this Transcript and is here incorporated by reference thereto as fully as though repeated verbatim.

[fols. 180-184] PLAINTIFF'S EXHIBIT 4

"Statements of Irving Trust Company, filed with Secretary of State of Ohio, on March 28, 1930, under Ohio General Code Section 178 and 183." Omitted in printing.

[fol. 185] PLAINTIFF'S EXHIBIT 6

STATE OF OHIO,
Lucas County:

COURT OF COMMON PLEAS

No. 131,925

CLARA SIELCKEN SCHWARZ, Plaintiff,

vs.

THE WOOLSON SPICE COMPANY et al., Defendants

Notice to Take Depositions

The defendants will take notice, that on Monday the 13th day of June, A. D. 1932, the plaintiff above named, will take the depositions of sundry witnesses to be used as evidence on the trial of the above cause, at the office of Fraser, Hiett, Wall and Effler, 710 Home Bank Building, Toledo, in the County of Lucas, the State of Ohio, between the hours of nine-thirty (9:30) o'clock A. M. and six o'clock P. M. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

June 6, 1932. Dated June 6, 1932.

Fraser, Hiett, Wall & Effler, Attorneys for Plaintiff.

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said deposition may be taken, is hereby waived.

Tracy, Chapman & Welles, Attorneys for The Woolson Spice Company, John W. Koehrman, Franklin H. Biggs, Frank D. Stranahan, and Robert A. Stranahan.

STATE OF OHIO,
County of Lucas, ss:

R. B. Swartzbaugh, being first duly sworn, says that on Monday, June 6, 1932, at about two thirty o'clock P. M., he served a copy of the within deposition notice upon Mr. Leroy Eastman, one of the Administrators of the Estate of William A. Brigham, deceased, and a member of the law firm of Smith, Baker, Effler and Eastman, which firm are attorneys for Ammi F. Mitchell and Leroy Eastman, Administrators of the Estate of William A. Brigham, deceased.

[fol. 186] Mr. Eastman acknowledged service of notice verbally but declined to do so in writing, and declined to enter any appearance.

(Signed) R. B. Swartzbaugh.

Sworn to before me and subscribed in my presence this 7th day of June, 1932. (Signed) L. A. Wilhelm, Notary Public, Lucas County, Ohio. (Notarial Seal.)

[fol. 187] PLAINTIFF'S EXHIBIT #7

(Subpœna duces tecum served upon C. N. Bevan.)

PLAINTIFF'S EXHIBIT #8

Plaintiff's Exhibit #8 (subpœna duces tecum served upon appellant, John W. Koehrman) appears in full at pages 103 to 104, supra, of this Transcript, and is here incorporated by reference thereto, as fully as though repeated verbatim.

PLAINTIFF'S EXHIBIT #9

(Subpœna served upon Robert A. Stranahan.)

PLAINTIFF'S EXHIBIT #10

(Notary's writ of attachment of Robert A. Stranahan.)

PLAINTIFF'S EXHIBIT #11

(Opinion of Court of Appeals of New York in the case of George C. Harrington, Administrator, vs. Eugene M. Keteltas, et al., 92 N. Y. 40.)

[fol. 188] DEFENDANT'S EXHIBIT 1

THE STATE OF OHIO,
Lucas County, ss:

IN THE COURT OF COMMON PLEAS WITHIN AND FOR THE COUNTY OF LUCAS AND STATE OF OHIO

Case No. 131,925

CLARA SIELCKEN SCHWARZ, Plaintiff,

against

THE WOOLSON SPICE COMPANY et al., Defendants

The defendant, Irving Trust Company, Executor, will take notice, that on Monday, the 13th day of June, A. D., 1932, the above named plaintiff will take the depositions of John W. Koehrman, C. N. Bevan, Robert A. Stranahan, Frank D. Stranahan and sundry witnesses to be used as evidence on the trial of the above entitled cause, at the office of Fraser, Hiett, Wall & Effler, 710 Home Bank Building, in the City of Toledo, County of Lucas and State of Ohio between the hours of 9:30 o'clock A. M. and 8 o'clock P. M., of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

Baker, Hostetler, Sidlo & Patterson, Attorneys for Plaintiff.

I acknowledge service of the above notice, by copy, this 7th day of June, A. D., 1932.

J. H. Dexter, Agent for Defendant, Irving Trust Company, Executor.

[fols. 189-191] DEFENDANT'S EXHIBIT 2

"State of Ohio Tax Return, 1932, Foreign Corporation; Annual Report of The Irving Trust Company, New York City, New York." Omitted in printing.

[fols. 192-194] DEFENDANT'S EXHIBIT 3

"State of Ohio Tax Return, 1931, Foreign Corporation, Annual Report of The Irving Trust Company, State of New York." Omitted in printing.

[fol. 195] DEFENDANT'S EXHIBIT 4

THE STATE OF OHIO,
Lucas County, ss:

To the Sheriff of Cuyahoga County:

You are commanded to notify Irving Trust Company, a foreign corporation as executor of the last will and testament of Herman Sielcken, deceased, that it has been sued by Clara Sielcken-Schwarz in the Court of Common Pleas of Lucas County, and that unless it answers by the second day of July, 1932, the petition of said plaintiff against it filed in the clerk's office of the said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the thirteenth day of June, A. D. 1932.

Witness Geo. E. Hardy, clerk of our said court, and the seal thereof hereto affixed, at Toledo, this second day of June, A. D. 1932.

Geo. E. Hardy, Clerk. M. E. Theuerkauff, Deputy Clerk.

THE STATE OF OHIO,
Cuyahoga County, ss:

Received this writ June 2, 1932, and pursuant to its command, on the second day of June, 1932, at 2:20 p. m. I served the defendant, Irving Trust Company, a foreign corporation, as executor of the last will and testament of

Herman Sielcken, deceased, by delivering to John H. Dexter, the duly authorized and designated managing agent of said defendant within this state, and the person duly authorized and designated as provided by law upon whom process against said corporate defendant may be served within this state, a copy of the summons with all endorsements thereon.

John M. Sulzmann, Sheriff. Jas. M. Gallagher, Deputy.

[fol. 196] In Court of Appeals of Lucas County, Ohio

C. A. No. 2691

Ex Parte C. N. Bevan

C. A. No. 2692

Ex Parte John W. Koehrman

C. A. No. 2693

Ex Parte Robert A. Stranahan

In Habeas Corpus

June 22nd, 1932.

Messrs. Tracy, Chapman & Welles and Messrs. Marshall, Melhorn, Marlar & Martin for petitioners.

Messrs. Fraser, Hiett, Wall & Effler and Messrs. Baker, Hostetler, Sidlo & Patterson for respondents.

Opinion

Williams, J.:

These actions, founded on applications for writs of habeas corpus, are brought to secure the discharge of certain witnesses who were committed by a notary public for refusing to appear and to produce certain books and for refusing to testify in the taking of depositions in an action for equitable relief brought by Clara Sielcken-Schwarz, plaintiff, against The Woolson Spice Company and other defendants in the court of common pleas of Lucas County,

Ohio. The petition in that cause was filed June 2, 1932 and summons was issued and served upon all of the defendants except Marion A. Miller, who could not be found within the county. On the same day, notice of taking depositions on behalf of plaintiff was served upon the same defendants, but no depositions were taken under this notice. A new notice was served upon the same defendants on June 6th, 1932, for the taking of depositions on June 13, 1932. Subpœnas to appear and testify and produce certain books and records were served upon the petitioners Bevan and Koehrman, and a simple subpœna upon the petitioner Stranahan. Bevan appeared on June 13, 1932 and answered a few questions, but refused to answer others. He further refused to produce books and records described in his subpœna. Both Koehrman and Stranahan disobeyed [fol. 197] the subpœnas and failed to appear. For contempt in refusing to answer questions and in refusing to produce books, papers and documents, the notary public ordered that Bevan be imprisoned in the county jail until he should submit to testify, and he was held in custody under this order of the notary at the time he sued out the writ of habeas corpus. Attachments were issued for Koehrman and Stranahan and they were arrested and held thereunder at the time the writs of habeas corpus were sued out for their release.

Many reasons are presented why the petitioners should be discharged, and we will discuss these questions in their order.

In the first place it is contended that the questions asked the witness Bevan were not material. In the action brought in the court of common pleas the plaintiff charged certain of the defendants with conspiring to fraudulently acquire the stock of Herman Sielcken in The Woolson Spice Company at a price far below its true value by wrongfully ousting him as president during his temporary stay in Germany and unlawfully causing the stock to be sold. Many of the questions put to the witness Bevan, which he refused to answer, were proper and material, and well calculated to elicit testimony tending to prove the allegations of the petition, and the books and records required to be produced by the subpœna duces tecum served upon him would undoubtedly, if produced, have a material bearing on the matters

under inquiry. This contention is therefore not well-founded.

It is also contended by petitioners that the petition filed in the common pleas court does not state a cause of action and the plaintiff does not have legal capacity to sue. As to the sufficiency of the petition, that is properly a question for the determination of the court in which the action is pending. However, in our judgment, depositions may be taken as a rule even though the petition does not state a cause of action, for it is not necessary that there should be an existing, as distinguished from a potential, issue of fact. It has even been held that they may be taken while error proceedings are pending in the reviewing court. [fol. 198] Fairchild v. Lake Shore Electric Railway Co., 101 Ohio St., 261.

As to the legal capacity of plaintiff to sue, there are numerous authorities to the effect that where a personal representative of the decedent's estate refuses to bring an action for the collection of assets, an heir or devisee may bring the action and make the personal representative a party defendant.

24 C. J., 797, Sec. 1981;
11 R. C. L., 262, Sec. 297;
See annotations in 22 L. R. A., 458 and
20 Amer. & Eng. Anno. Cases, 96.

The subpœnas duces tecum did not require the production of private and privileged papers, so far as the evidence discloses, and were not so indefinite that the parties upon whom they were served were justified in entirely ignoring them, nor is it a justification for refusing to obey a subpœna or to give testimony that witnesses are in good health and expect to be present at the trial.

In re Berger, 13 Ohio App., 206; affirmed 101 Ohio St., 512;
14 Ohio Jurisprudence, 10, Sec. 5;
Mathias vs. Poe, 20 Court of Appeals Opinions, Sixth District, unreported, 276.

The evidence adduced on hearing in this court shows that the depositions were being taken in good faith and we can not say that there was any ulterior motive or improper purpose in taking them. Section 11526, G. C., gives either

party the right to commence taking testimony by deposition at any time after service upon the defendant, and this right has been recognized by our Supreme Court and no party should be deprived of it without good cause.

In re Rauh, 65 Ohio St., 128.

The petitioners also make the novel contention that in attempting to punish for contempt the notary exercised judicial power in violation of Sec. 1 of Art. IV, Sec. 8 of Art. II and Section 32 of Art. II of the Constitution of Ohio, that Sections 11510, 11511 and 11512, G. C., are unconstitutional, if construed to give the notary power so [fol. 199] to adjudicate, that such attempted adjudication being made in the absence of the petitioner, without notice to him, or hearing, and without him being present or represented by counsel, or having opportunity to know of the charge against him, was in violation of the Constitution of Ohio and the 14th amendment to the Constitution of the United States, and that the notary public was disqualified to sit in judgment upon the petitioners by reason of his personal pecuniary interest. It is a complete answer to the contention so made by the petitioners that the notary public, in committing the witness to jail for refusing to answer questions and in issuing an attachment for the witnesses who refused to respond to subpœna, does not exercise judicial power.

De Camp vs. Archibald, 50 Ohio St., 618;
Benckenstein vs. Schott, 92 Ohio St., 29, 38.

Marion A. Miller was not served with process and is not a party to the suit, and may never be. In fact, there is no good reason why the cause may not be tried in the court of common pleas without obtaining service on Miller, as he does not seem to be a necessary party. However that may be, depositions may be used against parties who were served with notice and upon trial the depositions may be received against all defendants, if the one not receiving notice of the taking of them waives objection.

Ryan vs. Conner, 40 Ohio St., 368.

At any rate, the plaintiff might properly proceed to take depositions, although Miller had not been served with notice.

Many of the questions raised would, if decided, require this court to anticipate decisions of the court of common pleas. Questions of the sufficiency of pleadings are, in the first instance at least, properly questions for the determination of the court in which the pleadings are filed. We cannot decide in advance questions made in the court in which the original action pends, and what has been said is by way of argument only.

[fol. 200] We have no hesitancy in reaching the conclusion that the contentions of the petitioners are not well-founded and that the petitions should be dismissed.

Petitions dismissed.

Lloyd and Richards, JJ., concur.

Approved:

Roy H. Williams, Judge. (Seal.)

[fol. 201] Certificate of Lodgment omitted in printing.

[fol. 202] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 203] In Supreme Court of the United States

Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed—Filed March 20, 1933

The appellant in the above entitled cause states that the points upon which he intends to rely in this court in this case are as follows:

1. The Supreme Court of Ohio erred in holding that the General Assembly of Ohio did not violate any provision of the Federal Constitution in the enactment of Ohio General Code Sections 11510, 11511 and 11512, and in not finding and adjudging that said sections, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty, or property without due process of law."

2. The Supreme Court of Ohio erred in finding and adjudging that Ohio General Code Section 11514, which provides that a witness imprisoned by an officer under Ohio General Code Sections 11510, 11511 and 11512, may, after being imprisoned, apply to a judge of the Supreme Court, Court of Appeals, Common Pleas or Probate Court, of Ohio, who may discharge such witness if it appears that his imprisonment is illegal, affords due process of law to [fol. 204] the appellant, who was arrested and deprived of his liberty by order of a notary public under said Sections 11510, 11511 and 11512, and erred in not holding that said Sections 11510, 11511 and 11512, construed together with Section 11514, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment to the Constitution of the United States which provides that no State "shall deprive any person of life, liberty, or property, without due process of law".

3. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511, 11512 and 11514, and each of them, are constitutional and do not deny the appellant due process of law, and erred in not finding and adjudging that said sections, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law", in that (a) such sections as construed by the Supreme Court of Ohio, purport to authorize and empower a notary public in the course of the taking of depositions, at will to commit and imprison a witness, who under the law of Ohio may lawfully refuse to give evidence not pertinent to the issues made or tendered by the pleadings, for contempt in failing or refusing to appear and answer questions or produce documentary evidence, without conferring upon such notary public, or upon any judicial tribunal, the power judicially to hear and determine, before the commitment and imprisonment of the witness, the question of the materiality, relevancy and competency of the evi-

dence demanded and the guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral ac- [fol. 205] tion brought by the witness after his imprisonment, and in which he assumes the burden; and in that (b) no opportunity is afforded by said sections, or by the law of Ohio, for submitting fundamental questions arising under the Constitution of the United States and as to the jurisdiction of the notary public to the determination of a competent judicial tribunal before the witness is declared to be guilty of contempt and imprisoned by the order of the notary public.

4. The Supreme Court of Ohio erred in not finding and adjudging that the operation of Ohio General Code Sections 11510, 11511 and 11512 and each of them, as applied to the facts of this case, is in conflict with and violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, contravening that part of said amendment which provides that no State shall "deprive any person of life, liberty, or property, without due process of law", in that no provision is made by said sections or by the law of Ohio for a hearing by the notary public, before whom depositions are being taken for use in a civil cause pending in a state court, before such notary finds and adjudges, or attempts to find and adjudge, a person to be guilty of contempt and commits such person to jail, or for a notice of such hearing to one charged with having been guilty of contempt, and no opportunity is afforded to persons so charged to appear and defend in person or by counsel, and in that said sections provide, or attempt to provide, that the notary public might commit this appellant for contempt, without notice of any hearing to this appellant, and without providing or affording an opportunity for this appellant to be present at a hearing and to defend in person or by counsel, before finding and adjudging said appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail.

5. The Supreme Court of Ohio erred in not finding and adjudging that the attempted adjudication by the notary public, before whom depositions were being taken for use

in a civil cause pending in a state court, that any questions [fol. 206] that might be propounded to appellant and any books, papers or documents ordered to be produced by him were material to any issue in the case in which it was attempted to take said depositions, and his attempted adjudication that appellant was in contempt, and the issuing of an order of attachment under which appellant was arrested and deprived of his liberty, all in the absence of the appellant and without notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of appellant's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States and were null and void, contravening that part of said amendment which provides in part that no state "shall deprive any person of life, liberty, or property, without due process of law".

6. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of the Fourteenth Amendment to the Constitution of the United States in that they attempt and purport to confer on notaries public arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to order or to refuse to order that questions propounded to witnesses be answered or that books, papers and documents be produced, and to commit or to withhold commitment as for contempt of witnesses who refuse to answer questions propounded to them and ordered to be answered by said notaries public or to produce books, papers or documents ordered to be produced by said notaries public, without re- [fol. 207] gard to the materiality, relevancy or competency of such questions or such books, papers or documents.

7. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11503, 11510, 11511 and 11512, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that they attempt to confer upon notaries public, who under the laws of Ohio are ministerial executive officers vested with no power to hear and determine, the peculiarity and inher-

ently judicial power to attach and imprison a witness summarily as for alleged contempt of them; contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law."

8. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections, and each of them, as applied to the facts in this case, do not deny this appellant due process of law and are not unconstitutional, repugnant to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that as construed by the Supreme Court of Ohio, said sections purport to authorize and permit the attachment and the imprisonment of this appellant by a notary public who as in this case was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the said notary public's compensation being by law directly governed by the extent of the evidence the witness (this appellant) might be required to give, and [fol. 208] the said notary public having a direct, substantial, personal pecuniary interest in the taking of the deposition and in coercing the witness (this appellant) to testify; and in that the said notary public was thereby disqualified from determining whether this appellant was guilty of contempt and from issuing any order of attachment against the appellant and bringing about appellant's arrest and detention.

9. The Supreme Court of Ohio erred in not finding and adjudging that the notary public ordering appellant's attachment and detention had a direct, substantial, personal, pecuniary interest in taking of appellant's depositions for use in a civil cause pending in a state court, and in attempting to coerce and compel appellant to testify and to produce the books, papers and documents which appellant was ordered to produce and in finding and adjudging this appellant guilty of contempt and issuing said order of attachment, and in not finding and adjudging that said notary public was disqualified and without jurisdiction so to act and adjudge or to cause appellant's attachment and detention by reason of the fact that said notary was selected, employed and paid by the plaintiff in the alleged

pending suit in which it was attempted to take appellant's deposition, said alleged judgment and order of attachment being made at the request of the plaintiff in said alleged pending suit, and said notary public's employment being upon such terms that its extent and continuance and his continued compensation and the amount thereof were contingent upon and directly governed by procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and order of attachment, so that said notary public's acts in so adjudging and bringing about the appellant's arrest and detention were a denial of due process of law, in violation of Section [fol. 209] 1 of the Fourteenth Amendment to the Constitution of the United States of America and were null and void, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

10. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11503, 11510, 11511 and 11512, and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive the appellant of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

Appellant further states that only the following parts of the record, as filed in this Court, need be printed by the Clerk for the hearing of this case:

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1. Return of Clerk of the Supreme Court of Ohio	1
2. Petition for Appeal	2– 4
3. Assignment of Errors	6– 12
4. Statement particularly disclosing the basis upon which appellant contends that the Supreme Court of the United States has jurisdiction to review the judgment of the Supreme Court of Ohio	14– 20

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5. Order allowing Appeal	22– 23
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9. Appellee's Statement making against the jurisdiction asserted by the appellant	36– 58
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34. Print only title of Plaintiff's Exhibit 3, as follows: "Certificates of qualification under Ohio General Code Sections 178 and 183 issued to The Irving Trust Company by the Secretary of State of Ohio, March 28, 1930."	177
35. Page containing title of Plaintiff's Exhibits 3A and 3B, and reference to Plaintiff's Exhibit 3C (Order of Attachment of John W. Koehrman)	179
36. Print only title of Plaintiff's Exhibit 4, as follows: "Statements of Irving Trust Company, filed with Secretary of State of Ohio, on March 28, 1930, under Ohio General Code Sections 178 and 183"	180
37. Plaintiff's Exhibit 6 (Notice to take depositions) and proof of service	185–186
38. Page containing title of Plaintiff's Exhibit 7; reference to Plaintiff's Exhibit 8 (Subpœna duces tecum served upon John W. Koehrman); titles of Plaintiff's Exhibits 9 to 11, inclusive	187
39. Defendant's Exhibit 1 (Notice to take depositions)	188

Title of paper	Record page
40. Print only title of Defendant's Exhibit 2, "State of Ohio Tax Return, 1932, Foreign Corporation; Annual Report of The Irving Trust Company, New York City, New York"	189
41. Print only title of Defendant's Exhibit 3, "State of Ohio Tax Return, 1931, Foreign Corporation, Annual Report of The Irving Trust Company, State of New York"	192
42. Defendant's Exhibit 4 (Summons and Return of Service)	195
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Crary Davis, Geo. D. Welles, Counsel for Appellant. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

Dated March 17, 1933.

ACKNOWLEDGMENT OF SERVICE

Due service, and receipt of copy, of the Appellant's foregoing Statement of Points to be relied upon and Designation of the Parts of the Record to be printed are acknowledged.

Newton D. Baker, Raymond T. Jackson, John C. Morley, Harold W. Fraser, Counsel for Appellee.

March 18, 1933.

[fol. 214] [File endorsement omitted.]

Endorsed on cover: File No. 37,482. Ohio Supreme Court. Term No. 785. John W. Koehrman, appellant, vs. David M. Krieger, as sheriff of Lucas County, Ohio. Filed March 16, 1933. File No. 37,482.

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 786

ROBERT A. STRANAHAN, APPELLANT,

vs.

DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED MARCH 16, 1933

(37,483)

(37,483)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 786

ROBERT A. STRANAHAN, APPELLANT,

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DAVID M. KRIEGER, AS SHERIFF OF LUCAS COUNTY, OHIO

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fol. 1] Return of clerk omitted in printing.

[fol. 2] IN SUPREME COURT OF OHIO

No. 23654

EX PARTE ROBERT A. STRANAHAN, Plaintiff-in-error

PETITION FOR APPEAL FROM THE SUPREME COURT OF OHIO TO THE SUPREME COURT OF THE UNITED STATES—Filed Feb. 10, 1933

To the Chief Justice of the Supreme Court of Ohio:

The petitioner, Robert A. Stranahan, is the plaintiff-in-error in the above entitled case.

On the 14th day of June, 1932, petitioner commenced his suit in the Court of Appeals for Lucas County, Ohio, seeking his discharge from imprisonment by the Sheriff of Lucas County, Ohio, under an order of attachment issued by one William Purcell, a notary public, for an alleged contempt of said notary occurring during an attempt to take depositions before said notary public in a certain action, entitled "Clara Sielcken-Schwarz, Plaintiff, v. The Woolson Spice Company et al., Defendants", numbered 131,925 on the docket of the Common Pleas Court of Lucas County, Ohio. Final judgment was rendered against the petitioner by said Court of Appeals and by said judgment he was remanded to the custody of said Sheriff, the respondent herein.

After said judgment the petitioner filed his petition-in-error in this cause in the Supreme Court of Ohio, seeking a reversal of the said judgment of the said Court of Appeals; and, after hearing, the Supreme Court of Ohio, on January 25th, 1933, made and entered its final decision and judgment herein affirming the judgment of the said Court of Appeals.

The Supreme Court of Ohio is the highest court of the State of Ohio in which a decision could be had in said suit, and its said judgment is final.

[fol. 3] In this suit there is drawn in question the validity of certain statutes of the State of Ohio, viz., Ohio General Code Sections 11510, 11511 and 11512, on the ground that they and each of them, and the operation of said sections and each of them, as applied to the facts in this case, deprive the petitioner of liberty and property without due process of law and are repugnant to the Constitution of the United States, and particularly to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the decision of the Supreme Court of Ohio is in favor of their validity.

There is also drawn in question in this suit the validity of certain other statutes of the State of Ohio, viz., Ohio General Code Sections 11497 and 11514 on the ground that they and each of them and the operation of said sections and each of them, as applied to the facts in this case, likewise deprive the petitioner of liberty and property without due process of law and are repugnant to the Constitution of the United States and particularly to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and the decision of the Supreme Court of Ohio is in favor of their validity.

Manifest error has occurred, to this petitioner's prejudice, as shown herein and in the assignment of errors filed herewith, in which are more fully set out the errors complained of.

In accordance with the Rules of the Supreme Court of the United States (Rule 46, par. 2) the petitioner respectfully shows that this case is one in which, under the legislation in force when the Act of January 31, 1928 (45 Stat. 54; 28 U. S. C. A. Sec. 861 (a)) was passed, viz., under 28 U. S. C. A. Sec. 344, a review could be had in the Supreme Court of the United States on writ of error as a matter of right.

Wherefore petitioner prays for the allowance of an appeal from said Supreme Court of Ohio to the Supreme Court of the United States, in order that the decision and judgment of the Supreme Court of Ohio may be examined [fol. 4] and reversed and also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Supreme Court of Ohio, may be sent to the Supreme Court of the United States, as provided by law. Petitioner, desiring the appeal to be a super-

sedeas, also prays that an order be made fixing the amount of security which petitioner as appellant, shall give and furnish upon said appeal, and that upon the giving of said security, all further proceedings in this court be suspended and stayed, and the supersedeas granted by this court to the judgment of the Court of Appeals of Lucas County, Ohio, remain in force until the determination of said appeal by the Supreme Court of the United States.

George D. Welles, Crary Davis, Attorneys for Petitioner. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

[fol. 5] [File endorsement omitted.]

[fol. 6] IN SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Feb. 10, 1933

Plaintiff-in-error, Robert A. Stranahan, hereinafter referred to as appellant, in connection with and as a part of his petition for an appeal herein to the Supreme Court of the United States, assigns the following errors in the record and proceedings in this case upon which he will rely upon said appeal:

First. The Supreme Court of Ohio erred in affirming the judgment of the Court of Appeals of Lucas County, Ohio, and in refusing to reverse the judgment of said court.

Second. The Supreme Court of Ohio erred in not finding and adjudging that this appellant was wrongfully and illegally imprisoned without due process of law, in violation of his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, and in not ordering appellant discharged.

Third. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11497, 11510, 11511 and 11512, and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the pro-

visions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty, or property, without due process of law."

[fol. 7] Fourth. The Supreme Court of Ohio erred in holding that the General Assembly of Ohio did not violate any provision of the Federal Constitution in the enactment of Ohio General Code Sections 11510, 11511 and 11512, and in not finding and adjudging that said sections, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty, or property, without due process of law".

Fifth. The Supreme Court of Ohio erred in finding and adjudging that Ohio General Code Section 11514, which provides that a witness imprisoned by an officer under Ohio General Code Sections 11510, 11511 and 11512, may, after being imprisoned, apply to a judge of the Supreme Court, Court of Appeals, Common Pleas or Probate Court, of Ohio, who may discharge such witness if it appears that his imprisonment is illegal, affords due process of law to the appellant, who was arrested and deprived of his liberty by a notary public under said Sections 11510, 11511 and 11512, and erred in not holding that said Sections 11510, 11511 and 11512, construed together with Section 11514, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment to the Constitution of the United States which provides that no state "shall deprive any person of life, liberty, or property, without due process of law".

Sixth. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511, 11512 and 11514,

and each of them, are constitutional and do not deny the appellant due process of law, and erred in not finding and adjudging that said sections and each of them are in conflict with and violate the provisions of Section 1 of the [fol. 8] Fourteenth Amendment to the Constitution of the United States and are null and void, contravening that part of said amendment which provides that any state shall "deprive any person of life, liberty or property, without due process of law", in that (a) such sections as construed by the Supreme Court of Ohio, purport to authorize and empower a notary public in the course of the taking of depositions, at will to commit and imprison a witness, who under the law of Ohio may lawfully refuse to give evidence not pertinent to the issues made or tendered by the pleadings, for contempt in failing or refusing to appear and answer questions or produce documentary evidence, without conferring upon such notary public, or upon any judicial tribunal, the power judicially to hear and determine, before the commitment and imprisonment of the witness, the question of the materiality, relevancy and competency of the evidence demanded and the guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral action brought by the witness after his imprisonment, and in which he assumes the burden; and in that (b) no opportunity is afforded by said sections, or by the law of Ohio, for submitting fundamental questions arising under the Constitution of the United States and as to the jurisdiction of the notary public to the determination of a competent judicial tribunal before the witness is declared to be guilty of contempt and imprisoned by the order of the notary public.

Seventh. The Supreme Court of Ohio erred in not finding and adjudging that the operation of Ohio General Code Sections 11510, 11511 and 11512, and each of them, as applied to the facts of this case, is in conflict with and violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property, without due process of law", in that no provision is made by said sections or by the law of Ohio for a hearing by the notary

public, before whom depositions are being taken for use in a civil cause pending in a state court, before such notary [fol. 9] finds and adjudges, or attempts to find and adjudge, a person to be guilty of contempt and commits such person to jail, or for a notice of such hearing to one charged with having been guilty of contempt, and no opportunity is afforded to persons so charged to appear and defend in person or by counsel, and in that said sections provide, or attempt to provide, that the notary public might commit this appellant for contempt, without notice of any hearing to this appellant, and without providing or affording an opportunity for this appellant to be present at a hearing and to defend in person or by counsel, before finding and adjudging said appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail.

Eighth. The Supreme Court of Ohio erred in not finding and adjudging that the attempted adjudication by the notary public, before whom depositions were being taken for use in a civil cause pending in a state court, that any questions that might be propounded to appellant were material to any issue in the case in which it was attempted to take said depositions, and his attempted adjudication that appellant was in contempt, and the issuing of an order of attachment under which appellant was arrested and deprived of his liberty, all in the absence of the appellant and without notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of appellant's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States and were null and void, contravening that part of said amendment which provides in part that no state "shall deprive any person of life, liberty or property without due process of law".

Ninth. The Supreme Court of Ohio erred in not holding that appellant has, without due process of law and in violation of his rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States, been unlawfully deprived of his liberty in actual fact by reason of an order given by one of counsel for a party in a civil cause in the Court of Common Pleas of Lucas County, Ohio, to a notary public and carried into effect by such notary

public, who had been employed by such counsel, and that [fol. 10] appellant was in fact deprived of his liberty by the acts and orders of such counsel, pretending to comply with the form of law through the use of the signature of said notary public on the order of attachment for and under which appellant was arrested and deprived of his liberty.

Tenth. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of the Fourteenth Amendment to the Constitution of the United States in that they attempt and purport to confer on notaries public arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to order or to refuse to order that questions propounded to witnesses be answered, and to commit or to withhold commitment as for contempt of witnesses who refuse to answer questions propounded to them and ordered to be answered by said notaries public, without regard to the materiality, relevancy or competency of such questions.

Eleventh. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11510, 11511 and 11512, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that they attempt to confer upon notaries public, who under the laws of Ohio are ministerial executive officers vested with no power to hear and determine the peculiarly and inherently judicial power to imprison summarily as for alleged contempt of them, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property without due process of law".

Twelfth. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections and each of them, as applied to the facts in this case, do not deny this appellant due process of law and are not unconstitutional, repugnant to and in violation of Section 1

[fol. 11] of the Fourteenth Amendment to the Constitution of the United States in that as construed by the Supreme Court of Ohio, said sections purport to authorize and permit the attachment and imprisonment of this appellant by a notary public who as in this case was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the said notary public's compensation being by law directly governed by the extent of the evidence the witness (this appellant) might be required to give, and the said notary public having a direct, substantial, personal pecuniary interest in the taking of the deposition and in coercing the witness (this appellant) to testify; and in that the said notary public was thereby disqualified from determining whether this petitioner was guilty of contempt and from issuing any order of attachment against the appellant and bringing about appellant's arrest and detention.

Thirteenth. The Supreme Court of Ohio erred in not finding and adjudging that the notary public ordering appellant's attachment had a direct, substantial, personal pecuniary interest in the taking of appellant's depositions for use in a civil cause pending in a state court, and in attempting to coerce and compel appellant to testify and in finding and adjudging this appellant guilty of contempt and issuing said order of attachment, and in not finding and adjudging that said notary public was disqualified and without jurisdiction so to act and adjudge, or to cause appellant's attachment and detention, by reason of the fact that said notary was selected, employed and paid by the plaintiff in the alleged pending suit in which it was attempted to take appellant's deposition, said alleged judgment and order of commitment being made at the request of the plaintiff in said alleged pending suit, and said notary public's employment being upon such terms that its extent and continuance and his continued compensation and the amount thereof were contingent upon and directly governed by procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and order of attachment, so that said notary public's acts in so adjudging and bringing about the appellant's arrest and detention were a denial of due process of law,

[fol. 12] in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States of America and were null and void, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty, or property without due process of law".

Fourteenth. The Supreme Court of Ohio erred in holding that the Court of Appeals of Lucas County, Ohio, likewise did not err in holding as stated in each of the foregoing assignments of error numbered second to thirteenth, inclusive.

Wherefore the petitioner prays that the said judgment of the Supreme Court of Ohio, dated January 25th, 1933, in the above entitled cause be reversed and that judgment be rendered in his favor.

Dated February 10th, 1933.

George D. Welles, Crary Davis, Counsel for Appellant. Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

[fols. 13-21] [File endorsement omitted.]

[fol. 22] IN SUPREME COURT OF OHIO

No. 23654

EX PARTE ROBERT A. STRANAHAN, Plaintiff in Error

ORDER ALLOWING APPEAL—Filed Feb. 10, 1933

The plaintiff-in-error and appellant, Robert A. Stranahan, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Supreme Court of Ohio on the 25th day of January, 1933, and from each and every part thereof, and having presented and filed his petition for appeal, assignment of errors, prayer for reversal and his statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the said judgment of the Supreme Court

of Ohio, all pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now hereby ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of Ohio in the above entitled cause as provided by law, and it is further ordered that the Clerk of the Supreme Court of Ohio shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within forty days of this date.

It is further ordered that said appellant shall give good and sufficient security in the sum of $1,000.00 that said appellant shall prosecute said appeal to effect and if said appellant fail to make his plea good, he shall answer all damages and costs; that upon the appellant's giving said security, the appeal shall operate as a supersedeas and stay [fol. 23] of execution and other proceedings under said judgment of the Supreme Court of Ohio, pending such appeal and appellant shall be enlarged pending such appeal.

Dated February 10th, 1933.

Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio. —— ——, Associate Justice of the Supreme Court of the United States.

[fol. 24] [File endorsement omitted.]

[fols. 25 & 26] Citation, in usual form, showing service on David M. Krieger et al.; filed Feb. 16, 1933; omitted in printing.

[fol. 27] IN SUPREME COURT OF OHIO

[Title omitted]

STIPULATION AS TO TRANSCRIPT OF RECORD ON APPEAL—Filed March 3, 1933

It is hereby stipulated by and between counsel for the appellant, Robert A. Stranahan, and counsel for the appellee, David M. Krieger, as Sheriff of Lucas County, Ohio, that the Clerk of the Supreme Court of Ohio shall

make a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause and shall include in such transcript of record the following and no other papers and exhibits:

1. Title page and caption;

2. Petition-in-error filed in the Supreme Court of Ohio on June 24, 1932, and Entry of Appearance by defendant-in-error, filed with the Clerk of the Supreme Court of Ohio, on June 25, 1932;

3. Transcript of Docket and Journal Entries in Court of Appeals, Lucas County, Ohio, filed with the Clerk of the Supreme Court of Ohio on July 23, 1932;

4. The pleading which bears title "Petition for Writ of Habeas Corpus", filed in Court of Appeals, Lucas County, Ohio, on June 14, 1932, (which pleading appellant claims to be a petition for Writ of Habeas Corpus and appellee claims to be an Application for Discharge from Imprisonment under O. G. C. Sec. 11514); together with Exhibits attached to said petition, said Exhibits being the Subpœna upon this appellant, Robert A. Stranahan, and the writ of attachment of this appellant, Robert A. Stranahan;

5. The pleading bearing the title "Amendment to Petition for Writ of Habeas Corpus", filed in Court of Appeals, Lucas County, Ohio, on June 15, 1932, (which pleading appellant claims to be an amendment to his Petition for [fol. 28] a Writ of Habeas Corpus and appellee claims to be an Amendment to an Application for Discharge from Imprisonment under O. G. C. Sec. 11514); together with Exhibit A, attached thereto, which Exhibit A is the petition filed in the Court of Common Pleas, Lucas County, Ohio, in case entitled "Clara Sielcken-Schwarz, New York, plaintiff, v. The Woolson Spice Company, et al., defendants";

6. Writ bearing the title "Writ of Habeas Corpus" filed with the Clerk of said Court of Appeals, Lucas County, Ohio, on June 15, 1932 (which writ appellant claims to be a Writ of Habeas Corpus and appellee claims to be a writ issued upon an Application for Discharge from Imprisonment under O. G. C. Sec. 11514), together with the Sheriff's

Return thereto; the Writ and attachment papers attached to said return to be shown only by incorporating, by reference, the "order of attachment" and subpœna attached as exhibits to the pleading (referred to in paragraph numbered 4 of this Stipulation) bearing the title of "Petition for Writ of Habeas Corpus"; the Sheriff's return to said order of attachment and the Notary's return of service of said subpœna to be here included in full;

7. Recognizance, filed with the Clerk of said Court of Appeals of Lucas County, Ohio, on June 17, 1932;

8. Motion for New Trial, filed with the Clerk of said Court of Appeals of Lucas County, Ohio, on June 22, 1932;

9. Bill of exceptions, allowed by said Court of Appeals on June 23, 1932, and filed with the Clerk of the Supreme Court of Ohio on July 23, 1932; together with plaintiff's Exhibits 1, 2, 3, 3A, 3B, 3C, 4 and 6 to 11, inclusive, and defendant's Exhibits 1 to 4, inclusive. Of the foregoing exhibits the following to be shown only by reference to the same papers in preceding pages of transcript, viz: Plaintiff's Exhibit 1 (petition in case of Clara Sielcken-Schwarz, plaintiff, v. The Woolson Spice Company, et al., defendants) by incorporating, by reference, the same paper which is attached as Exhibit A to the pleading (referred to in paragraph numbered 5 of this stipulation) bearing the title "Amendment to Petition for Writ of Habeas Corpus;" Plaintiff's Exhibits 3B and 10 (order of attachment of Robert A. Stranahan) and 9 (subpœna on said Robert A. Stranahan) by incorporating, by reference, the same papers [fol. 29] which are attached as Exhibits to the pleading (referred to in paragraph numbered 4 of this stipulation) bearing the title "Petition for Writ of Habeas Corpus"; of the foregoing Exhibits the following to be indicated only by title as follows, viz: Plaintiff's Exhibit 3A (Notary's Order of Commitment for C. N. Bevan); Plaintiff's Exhibit 3C (Notary's Writ of Attachment of John W. Koehrman); Plaintiff's Exhibit 7 (Subpœna Duces Tecum served upon C. N. Bevan); Plaintiff's Exhibit 8 (Subpœna Duces Tecum served upon John W. Koehrman); Plaintiff's Exhibit 11 (Opinion of the Court of Appeals of New York in the case of George C. Harrington, Administrator, v. Eugene M. Keteltas, 92 N. Y. 40); of the foregoing, Plain-

tiff's Exhibit 4 and Defendants' Exhibits 2 and 3 shall be abbreviated in accordance with the typewritten copies thereof submitted to you by counsel.

10. Opinion of the Court of Appeals of Lucas County, Ohio, in this cause.

11. Journal Entry filed in Supreme Court of Ohio on August 24, 1932, substituting Gilson D. Light, as Sheriff of Lucas County, Ohio, as defendant-in-error;

12. Motion for Stay of Execution and Advancement of Cause, filed in Supreme Court of Ohio, on October 15, 1932, and notice of hearing;

13. Order of Supreme Court of Ohio, entered on or about October 26, 1932, granting stay of execution;

14. Supersedeas bond filed in Supreme Court of Ohio on November 25, 1932;

15. Judgment of the Supreme Court of Ohio filed on January 25, 1933;

16. Opinion of Supreme Court of Ohio in this cause;

17. Order of Supreme Court of Ohio substituting David M. Krieger as Sheriff of Lucas County, Ohio, as defendant-in-error nunc pro tunc, filed February 10, 1933;

[fol. 30] 18. Appellant's petition for appeal filed herein on February 10, 1933;

19. Appellant's assignment of errors, filed herein on February 10, 1933;

20. Appellant's statement as to the basis on which he contends that the Supreme Court of the United States has jurisdiction on appeal to review the said judgment of the Supreme Court of Ohio, filed herein on February 10, 1933;

21. Order allowing appeal and supersedeas, filed herein on February 10, 1933;

22. Appeal and supersedeas bond approved and filed herein on February 17, 1933;

23. Statement to respondent-appellee (defendant-in-error in the Supreme Court of Ohio) re Paragraph 3, Rule 12, of the Supreme Court of the United States, and ac-

knowledgment of service thereof, filed herein on February 10, 1933;

24. Citation upon appeal and proof of service, filed herein on February 16, 1933;

25. Stipulation as to Transcript of Record on Appeal;

26. Appellee's Statement Making Against the Jurisdiction Asserted by the Appellant, filed herein on February 24, 1933;

27. Clerk's certificate.

Said transcript to be prepared as required by law and the rules of the Supreme Court of the United States and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 22nd day of March, 1933, pursuant to the order allowing said appeal.

It is further stipulated by and between the parties that the foregoing items constitute all portions of the record necessary for a determination of the questions raised on this appeal and that no portion of the record omitted is [fol. 31] necessary or material for a determination of such questions.

Dated March 2, 1933.

Geo. D. Welles, Crary Davis, Attorneys for Appellant. Stuart S. Wall, H. S. Bugbee, Thomas J. Lynch, of Counsel. Baker, Hostetler, Sidlo & Patterson, Fraser, Hiett, Wall & Effler, Attorneys for Appellee. Newton D. Baker, Harold W. Fraser, Raymond T. Jackson, John C. Morley, of Counsel.

[fols. 32-59] [File endorsement omitted.]

[fols. 60 & 61] Supersedeas bond on appeal for $1,000 approved and filed February 17, 1933, omitted in printing.

[fol. 62] IN SUPREME COURT OF OHIO

[Title omitted]

PETITION-IN-ERROR

Filed June 24, 1932

Robert A. Stranahan, plaintiff-in-error (hereinafter referred to as the petitioner), says that at the May Term,

1932, of the Court of Appeals of Lucas County, Ohio, on June —, 1932, in an action for a writ of habeas corpus which originated and was therein pending, being Cause No. 2693, entitled "Ex Parte Robert A. Stranahan", and in which plaintiff-in-error was petitioner, and Joseph Zimmerman, as Sheriff of Lucas County, Ohio, was respondent, a judgment was rendered against the petitioner.

Said case originated in said Court of Appeals and involved questions arising under the Constitution of the United States and the Constitution of Ohio.

A transcript of the docket and journal entries and the original papers in said Court are filed herewith.

There is substantial error in said record, proceedings and judgment, to the manifest prejudice of petitioner, in the following and other respects:

(1) Said Court of Appeals erred in not finding and adjudging that petitioner was unlawfully deprived of his liberty, and in not discharging him.

(2) Said Court of Appeals erred in re-committing and remanding petitioner to the custody of the respondent.

(3) The finding, decision and judgment of said Court of Appeals are contrary to law.

(4) The finding, decision and judgment of said Court of Appeals are not sustained by sufficient evidence.

(5) The finding, decision and judgment of the Court of Appeals are erroneous, in that there is no evidence to sustain them.

(6) Said Court of Appeals erred in not finding and adjudging that the order of attachment under which petitioner [fol. 63] was imprisoned by the respondent was void and of no effect.

(7) Said Court of Appeals erred in not finding and adjudging that the petition of the plaintiff in the case in which it was attempted to take said depositions, viz: Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants, stated no cause of action whatever and tendered no issue whatever and that no testimony which petitioner could give would be relevant or ma-

terial to any issue whatever under said alleged petition or in said alleged action and that therefore the action of the notary public in attempting to adjudge that petitioner was in contempt and in issuing an attachment for petitioner and bringing about his arrest and detention violated the provisions of Section 1 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States and were illegal, null and void.

(8) Said Court of Appeals erred in not finding and adjudging that the petition of the plaintiff in said case No. 131,925 in the Court of Common Pleas of Lucas County, Ohio, in which it was attempted to take said depositions, affirmatively showed that said plaintiff had no capacity or right whatever to bring or prosecute said action or to take any depositions at all therein or to enforce the attendance or testimony of any witnesses and that therefore the action of the notary public in attempting to adjudge that petitioner was in contempt and in issuing any attachment for petitioner and bringing about his arrest and detention violated the provisions of Section 1 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States and were illegal, null and void.

(9) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article I of the Constitution of the State of [fol. 64] Ohio and are null and void, in that they deprive the petitioner of his liberty and property, contravening that part of Section 1 of Article I, which provides that all men "have certain inalienable rights, among which are those of enjoying and defending liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety".

(10) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in

this case, are in conflict with and violate the provisions of Section 14 of Article I of the Constitution of Ohio, and are null and void, in that they deprive the petitioner of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of Section 14 of Article I, which provides that the "right of the people to be secure in their persons, houses, papers and possessions against unreasonable searches and seizures shall not be violated".

(11) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Sections 5, 10 and 16 of Article I and Section 32 of Article II of the Constitution of Ohio, and are null and void.

(12) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of said sections as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article IV of the Constitution of Ohio in that they attempt to confer judicial power on notaries.

(13) Said Court of Appeals erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of [fol. 65] Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, and are null and void, in that they deprive the petitioner of his liberty and property without due process of law; contravening that part of Section 1 of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

(14) Said Court of Appeals erred in not finding and adjudging that said notary public had no jurisdiction to attempt to take said depositions or to force or require peti-

tioner to attend as a witness or to adjudge petitioner in contempt for failing or refusing so to do, or to make or issue any order of attachment against this petitioner.

(15) The Court of Appeals erred in not finding and adjudging that said notary public, in attempting to adjudge petitioner in contempt and in issuing an attachment for him, attempted to exercise judicial powers in violation of Section 1 of Article IV of the Constitution of Ohio, and that all of said acts of said notary were null and void.

(16) Said Court of Appeals erred in not finding and adjudging that the notary public purporting to act under said Sections 11510, 11511 and 11512 of the General Code of Ohio and attempting to adjudge the petitioner guilty of contempt and issuing said order of attachment for his person, was disqualified on account of his personal pecuniary interest in the taking of said depositions so to adjudge and act and to cause any attachment to be issued against petitioner by reason of the fact that said notary public was employed and paid by the plaintiff in said alleged pending suit, the notary's judgment of contempt and attachment being made and issued at the request of said plaintiff and that his employment was upon such terms that its extent and continuance and his continued compensation was contingent upon procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and attachment and that therefore said notary's acts in so adjudging and bringing about petitioner's attachment and detention were a denial of due process of law in violation of the Fourteenth Amendment [fol. 66] to the Constitution of the United States of America and were null and void.

(17) Said Court of Appeals erred in not finding and adjudging that the attempted adjudication by the notary that the petitioner was in contempt and the issuance of an attachment against him in petitioner's absence and without notice to him or to his counsel and without an opportunity for him first to know the charges against him or to have a hearing thereon were in violation of petitioner's constitutional rights under Sections 1, 5, 10, 14 and 16 of Article I and Section 1 of Article IV of the Ohio Constitution and each of such sections and in violation of his rights under the

Fourteenth Amendment of the Constitution of the United States and were null and void.

(18) Said Court of Appeals erred in not finding and adjudging that the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, in which it was attempted to take said depositions was not entitled to take depositions nor did the notary public have power or jurisdiction to issue any subpœna requiring the attendance of any witness or issue any attachment for any witness for the reason that no service of summons had been made on one of the defendants in said action, viz: Marion M. Miller, nor had any service been made on the defendant Irving Trust Company in its capacity as Executor of the Estate of Hermann Sielcken, deceased.

(19) Said Court of Appeals erred in not finding and adjudging that the attempt of the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants, to take depositions in said case was not in good faith for the purpose of securing or perpetuating any evidence material to any issue of said case or for use in the trial of said case or that it was not otherwise in good faith, but was an abuse of process.

(20) The Court of Appeals erred in other respects apparent on the face of the record.

(21) Said Court of Appeals erred in overruling petitioner's motion for a new trial.

[fol. 67] Wherefore, petitioner prays that said judgment in the Court of Appeals be reversed and that he be restored to all things lost thereby.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Plaintiff-in-error.

[fol. 68] IN SUPREME COURT OF OHIO

[Title omitted]

ENTRY OF APPEARANCE—Filed June 25, 1932

The undersigned defendant-in-error and respondent waives the issuances and service of summons-in-error and enters his appearance herein.

Joseph Zimmerman, as Sheriff of Lucas County, Ohio.

6/24/32.

Fraser, Hiett, Wall & Effler, Counsel of record for Respondent in Court of Appeals.

[fol. 69] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER SUBSTITUTING SHERIFF—Filed August 24, 1932

Upon the suggestion by counsel for the petitioner, and it appearing to the court, that during the pendency of these proceedings-in-error the respondent and defendant-in-error, Joseph Zimmerman, has ceased to be Sheriff of Lucas County, Ohio, and that Gilson D. Light has succeeded said Zimmerman in said office and is now the Sheriff of Lucas County, Ohio, and with the consent of all parties, including said Gilson D. Light.

It is Ordered and Adjudged:

That said Gilson D. Light, as Sheriff of Lucas County, Ohio, is substituted as respondent and defendant-in-error herein in place of said Joseph Zimmerman, and that these proceedings-in-error proceed under their original title

Approved.

Tracy, Chapman & Weiles, Marshall, Melhorn, Marlar & Martin, Attorneys for Petitioner-Plaintiff-in-error. Baker, Hostetler, Sidlo & Patterson, Fraser, Hiett, Wall & Effler, Attorneys for Respondent-Defendant-in-error.

O. K. Gilson D. Light.

[fol. 70] IN SUPREME COURT OF OHIO

[Title omitted]

MOTION FOR STAY OF EXECUTION AND ADVANCEMENT OF CAUSE—Filed October 15, 1932

Now comes plaintiff-in-error, R. A. Stranahan, and moves the court for an order staying execution of the final judgment of the Court of Appeals of Lucas County, Ohio, to reverse which this proceeding-in-error is being prosecuted, until this proceeding-in-error shall have been heard and decided by this court, and to fix the terms of such stay of execution.

Plaintiff-in-error further moves the court that, in the event his motion for a stay of execution be not granted, this cause be advanced for hearing and decision by this court on a date prior to the 25th day of October, 1932.

The foregoing motion for stay of execution is made upon the grounds that the present proceeding, which is in habeas corpus, presents substantial and important questions for determination.

(a) As to the construction of Sections 11510, 11511 and 11512, General Code, and their constitutionality both in respect to the Constitution of the State of Ohio and the Fourteenth Amendment to the Constitution of the United States;

(b) As to the disqualification of the Notary Public to issue the orders of commitment and attachment;

(c) As to whether any evidence is or could be relevant or material, or the giving of it enforced at the instance of the plaintiff in an action which the plaintiff has no right or capacity to maintain and in which her petition states no cause of action;

(d) As to whether the plaintiff in said action, in the Common Pleas Court of Lucas County, Ohio, has any right or capacity to maintain said action and whether her petition states any cause of action, which questions are raised in said Common Pleas Court by a demurrer filed by one [fols. 71-74] of the defendant in said action, which demurrer is pending and set for hearing on October 27, 1932;

(e) Other and related questions, shown by the brief of plaintiff-in-error, which questions are of general interest and importance; and upon the further grounds appearing in the attached affidavit of plaintiff-in-error in support hereof.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Plaintiff-in-error.

[fol. 75] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER GRANTING MOTION BY PLAINTIFF IN ERROR FOR STAY OF EXECUTION AND ADVANCEMENT OF CAUSE—Oct. 26, 1932

It is ordered by this Court that this motion be, and the same hereby is, allowed.

Journal 33, Page 29.

[fol. 76] Supersedeas bond on stay for $100.00 approved and filed Nov. 25, 1932, omitted in printing.

[fol. 77] IN SUPREME COURT OF OHIO, OF THE TERM OF JANUARY, A. D. 1933

No. 23654

Ex Parte ROBERT A. STRANAHAN

Error to the Court of Appeals of Lucas County

JUDGMENT—Jan. 25, 1933

This cause came on to be heard upon the transcript of the record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable

grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended taxed at $—.

Ordered, that a special mandate be sent to the Court of Appeals of Lucas County to carry this Judgment into execution.

Journal 33, page 91.

[fol. 78] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER SUBSTITUTING SHERIFF—Filed February 10, 1933

Upon the suggestion by counsel for the plaintiff-in-error, and it appearing to the Court, that during the pendency of these proceedings in error, viz., on January 1, 1933, defendant-in-error, Gilson D. Light, ceased to be Sheriff of Lucas County, Ohio, and that David M. Krieger has succeeded said Light in said office and is now Sheriff of Lucas County, Ohio.

It is Ordered and Adjudged:

That said David M. Krieger, as Sheriff of Lucas County, Ohio, is substituted nunc pro tunc as defendant-in-error herein in place of said Gilson D. Light.

Carl V. Weygandt, C. J.

[fol. 79] IN SUPREME COURT OF OHIO

Ex Parte BEVAN

Ex Parte KOEHRMAN

Ex Parte STRANAHAN

Evidence—Depositions—Judicial power not exercised by notary public committing witness for contempt—Constitutional law—Sections 11510, 11511 and 11512, General Code—Due process of law—Committed witness

afforded statutory remedy—Section 11514, General Code—Relevancy or competency of testimony and privilege preserved in trial court—Right to cross-examine adverse party vests when summons served—Sections 11497 and 11526, General Code—Cross-examination authorized, although codefendant not served—Codefendant may be served, how—Section 11299, General Code—Infirmity of petition or action not ground for refusal to respond—Notary public not disqualified for interest in taking depositions—Subpœna duces tecum not unreasonable search and seizure—Entire corporate correspondence file, records and documents ordered produced—Collection of assets of corporation—Heir or legatee may maintain action, upon refusal of personal representative.

1. Judicial power is not exercised by a notary public, during the taking of depositions, in committing to jail witnesses who refuse to answer questions, and in attaching and committing to jail witnesses who disobey the order of their subpœna.

2. The general assembly did not violate any provision of the federal or state constitution in the enactment of Sections 11510, 11511 and 11512, General Code, in delegating such power to notaries public. (DeCamp v. Archibald, 50 Ohio. St., 618, and Benckenstein v. Schott, 92 Ohio St., 29, approved and followed.

3. A witness committed by a notary public, under Sections 11510, 11511 and 11512, General Code, has his remedy under Section 11514, General Code, and is not denied due process of law. Where the witness is a party and is being examined as upon cross-examination under the Statute, the further right to test the relevancy or competency of the questions and to demand his privilege, is preserved to him in the trial court.

4. The right of a party to an action to examine the adverse party as upon cross-examination under Section 11497, General Code, vests as soon as summons is served on such party as provided by Section 11526, General Code. The fact that a co-defendant has not been served with summons, does not furnish any reason

why the party served should not submit to such examination, since the party plaintiff may proceed under Section 11299, General Code.

[fol. 80] 5. No ground for refusal to appear before a notary public and testify, is afforded officers of a corporation by the fact that the petition in the action, in which it is sought to take the depositions of such officers as upon cross-examination, is claimed to be demurrable, or that the action was not brought within the time provided by law, or that a party plaintiff has been guilty of laches.

6. The claim that a notary public has such an interest in the taking of depositions as disqualifies him to act, is untenable, and the case of Tumey v. Ohio, 273 U. S., 510, has no application whatever.

7. In an action charging fraudulent conspiracy by the officers of a corporation, because of the tendency toward liberality in cases of this character, the range of the testimony is wide, and subpœnas duces tecum, which command that the entire correspondence file, records and documents of such corporation for many years back, be produced before the notary public by the officers of the corporation, to be used in connection with the giving of their depositions as upon cross-examination, are not so broad and sweeping as to be violative of due process, and do not constitute unreasonable searches and seizures.

8. When a personal representative of a decedent's estate refuses to bring an action for the collection of assets, an heir, legatee or devisee may bring the action and make such personal representative a party defendant.

Nos. 23652, 23653 and 23654

Decided January 25, 1933

Error to the Court of Appeals of Lucas County

Opinion

These are proceedings in error to review the respective judgments of the Court of Appeals of Lucas county, Ohio, made and entered in the above-entitled cases.

An intelligent consideration of the issues involved necessitates a comprehensive statement. In order to make it comprehensive, some time and much space have been consumed.

These judgments respectively deny original applications by the plaintiffs in error for discharge from the custody of the sheriff of Lucas county. The plaintiff in error C. N. Bevan was held under a commitment issued by a notary [fol. 81] public for his refusal to answer material questions, refusal to answer any further questions of any character, and refusal to produce material books or records, pursuant to a subpœna duces tecum, in the course of the taking of his deposition in the suit of Clara Sielcken-Schwarz v. The Woolson Spice Company et al., pending in the common pleas court of Lucas county. The plaintiffs in error John W. Koehrman and Robert A. Stranahan had respectively been arrested under attachments issued by the same notary, upon their refusal to appear and give their depositions in the same case, in response to subpœnas personally served upon them.

The materal facts are as follows: On June 2, 1932, Clara Sielcken-Schwarz, as widow and sole residuary legatee of the late Hermann Sielcken, filed her petition in the common pleas court of Lucas county, Ohio, against the Woolson Spice Company, an Ohio corporation, of which the plaintiff in error, C. N. Bevan, is secretary and treasurer; against plaintiffs in error John W. Koehrmann and Robert A. Stranahan; against Franklin H. Biggs, Marion M. Miller and Frank D. Stranahan; against Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William Brigham, deceased; and against the Irving Trust Company, a foreign corporation, as executor of the last will and testament of Hermann Sielcken, deceased.

The petition charges that the defendants Koehrmann and Biggs and said Brigham fraudulently conspired together to take advantage of the absence in Germany of Sielcken (president and controlling stockholder of the Woolson Company), where he had gone on the business of the company, and where he had been detained by his last illness and the exigencies of the World War, to oust Sielcken as president, and to wrongfully acquire control of the corporation and manipulate and exploit it in their own interests; that thereafter said Koehrman, Biggs and Brigham. in asso-

[fol. 82] ciation with Robert A. Stranahan and Frank Stranahan, aided and abetted by the Woolson Spice Company, fraudulently conspired together to acquire for a grossly inadequate price the stock formerly held by Sielcken and then held by his estate; that the fraudulent conspiracy was carried on by such individual defendants taking advantage of the control of the corporation, wrongfully acquired by them, to misrepresent the financial condition, business and prospects of the Woolson Company; that such fraudulent misrepresentations were communicated to the executor, and to all prospective purchasers of the stock; and that as a result of this wrongful and fraudulent conspiracy the individual defendants, aided and abetted by the Woolson Spice Company, obtained the stock of the Sielcken estate for a grossly inadequate price.

The petition asks to have the stock so obtained restored to the estate, together with all dividends paid thereon since its fraudulent conversion.

The petition alleges that the fraud was not discovered by the plaintiff, sole residuary legatee, until 1931, and was not discovered by the executor prior to that time. The petition further sets forth that since the executor has failed and refused to bring the suit on request of the plaintiff, such executor is therefore joined as a party defendant.

On the same day the petition was filed, summons was duly issued and served upon all of the defendants except Marion M. Miller, who could not be found within the county and who has not been served. On the same day, after service of summons, notice to take depositions on June 6, 1932, was served on the common pleas defendants, and subpœnas duces tecum were served on the witnesses, Koehrman and Bevan. No proceedings were had on this notice because prior to June 6th counsel for the common pleas plaintiff were served with a motion to quash the notice to take depositions and the subpœnas duces tecum, and to enjoin [fol. 83] the taking of depositions. This motion came on for hearing before the common pleas court of Lucas County, Ohio, on June 6, 1932, and, at the suggestion of the court, an agreement was reached between counsel for the common pleas plaintiff and chief counsel for the common pleas defendants, and for these plaintiffs in error, that the taking of depositions should be postponed until June 13th. Pursuant to that agreement new notices to take depositions

on June 13th were served on the common pleas defendants, subpœnas duces tecum upon the plaintiffs in error Bevan and Koehrman, and ordinary subpœnas upon the plaintiff in error Robert A. Stranahan and upon Frank Stranahan.

At 9:30 a. m., on June 13th, the hour fixed for taking the depositions, the witness Bevan appeared, but without any of the books and papers called for in his subpœna. The witnesses Koehrman and Stranahan disregarded their subpœnas and failed to appear. On the failure of three of the witnesses summoned to appear, and the failure of the witness, Bevan, to make any compliance with his subpœna duces tecum, the notary adjourned the hearing until 2 p. m., of the same day, and ordered Bevan to produce at that time the books and records described in his subpœna. Prior to this adjourned time for the taking of these depositions a supplemental motion to quash the new notices and subpœnas, and to enjoin the taking of depositions in the common pleas suit was filed in the common pleas court. At 2 p. m., on June 13th, being the time to which the taking of the depositions had been adjourned, Koehrman and Stranahan again failed to appear. Bevan appeared and was duly sworn and proceeded to answer a few questions as to his name and occupation. He was then asked a series of questions, subsequently found to be material by the Court of Appeals for Lucas county, Ohio, and in each instance, upon being ordered to answer by the notary, he refused to do so, making no claim of privilege, and giving as his only [fol. 84] reason that he was advised by counsel not to answer. Bevan also refused to produce any of the books, records or documents required by his subpœna duces tecum. Finally Bevan stated that he would answer no further questions of any kind or character whatsoever, and he again refused to produce any of the books, records or documents described in his subpœna duces tecum.

Thereupon the notary adjudged that said questions were material, and that said books, papers and documents were material and properly described, and issued to the sheriff of Lucas county, Ohio, a commitment directing him to arrest and commit the said witness to the county jail until he should testify. The witnesses Koehrman and Stranahan having failed and refused to appear in obedience to their subpœnas, the notary issued writs of attachment for each of them, commanding the sheriff of Lucas county,

Ohio, to attach each of them and bring them before the notary forthwith "as well to answer the State of Ohio for said contempt in disobeying said subpœna as to give his testimony in the action."

No arrests were made under the commitment or writs until 9:10 a. m., on June 14th, at which time the sheriff's office was advised by counsel for the plaintiffs in error that Bevan, Koehrman and Robert A. Stranahan were then in the Lucas county courthouse, ready to be arrested. A technical arrest was then made, and three applications for discharge from illegal imprisonment or petitions for writs of habeas corpus were immediately filed with the Court of Appeals of Lucas county, Ohio. The applications or writs were granted at once, before the sheriff had an opportunity to produce the witnesses Koehrman and Stranahan before the notary, and all were immediately released on their own recognizances, pending hearings on their applications or petitions.

Thereupon counsel for the plaintiffs in error and com- [fol. 85] mon pleas defendants dismissed without prejudice, and without any hearing, the motion and supplemental motion to enjoin the taking of depositions in the suit which had been filed in the common pleas court.

On the morning of June 15, 1932, the plaintiffs in error filed in the Court of Appeals of Lucas county, Ohio, amendments to their respective applications or petitions, in which they raised the constitutional questions now sought to be brought before this court.

The original applications or petitions, and the amended applications or petitions, were heard by the Court of Appeals of Lucas county on June 15th and 16th, and after hearing all evidence offered by counsel on the legality of the restraint of the respective witnesses, lengthy arguments of counsel, and the submission of briefs, that court on June 21, 1932, held that the common pleas plaintiff was entitled to take the depositions of these witnesess at once; that the subpoenas duces tecum called for material, books and papers, and were not too broad; that the questions asked the witness Bevan were material; that he was guilty of contempt for refusing to produce the books and papers; and that the witnesses Koehrman and Stranahan were legally attached for disobeying their subpoenas.

On June 22d the Court of Appeals for Lucas county, Ohio, ordered the applications dismissed and the applicants remanded to the custody of the sheriff of Lucas county. On the same day motions for a new trial in the Court of Appeals of Lucas county were overruled. Petitions in error were at once filed in this court by plaintiffs in error, and on June 25th respective applications for stays of execution were addressed to Judge Kinkade of this court. After a full hearing, Judge Kinkade overruled the applications. Similar applications were presented to the Court of Appeals of Lucas county on June 27th, and on June 29th these [fol. 86] applications for stays were likewise overruled by that court.

Messrs. Tracy, Chapman & Welles, Messrs. Marshall, Melhorn, Marlar & Martin, Mr. Harry S. Bugbee, Mr. Stuart S. Wall, Mr. Crary Davis and Mr. Thomas J. Lynch, for plaintiffs in error.

Messrs. Baker, Hostetler, Sidlo & Patterson and Messrs. Fraser, Hiett, Wall & Effler, for defendant in error.

STEPHENSON, J.:

These three cases were consolidated and submitted together, as the same alleged controlling questions arise in each case. There will be no further statement of fact in this opinion, other than is absolutely necessary in order to apply the law, as the court interprets it.

It is assumed that the depositions in question were being taken before a regularly appointed notary public in pursuance of notice as provided by statute, as no question was raised along these lines.

Stranahan was served with an ordinary subpoena, and Bevan and Koehrman were served with subpoenas duces tecum.

No complaint is made as to the service of the subpoenas. It is contended that the subpoenas duces tecum "were so broad and sweeping in their terms as to be violative of due process and to constitute unreasonable searches, and seizures, in addition to calling for incompetent and immaterial evidence."

As bearing upon this particular phase of the case it is significant that no question of privilege was raised.

Stranahan and Koehrman disobeyed the order of their subpoenas and failed to appear. Bevan appeared, was sworn, answered the preliminary questions as to name and residence, refused to answer further questions, and refused to produce any of the books, records and documents de- [fol. 87] scribed in his subpoena duces tecum, giving as his reason therefor that he "was acting upon the advice of counsel," which, of itself, in a case of this character, is no reason at all. Attachments were issued and served on Stranahan and Koehrman. Brushing aside the preliminary proceedings, all three of them were arrested and committed to jail until they "should testify." Thereupon applications were made to the Court of Appeals for their release. It would be of little moment whether the application was made under favor of Section 11514, General Code of Ohio, or whether it was in the form of habeas corpus, except that the United States Circuit Court of Appeals of the Sixth Circuit has held substantially that this statute provides a method for judicial review of the action of the notary. Bevan v. Light, Sheriff, (C. C. A.), 61 F. (2d), 1019.

The Court of Appeals heard the applications of all three, dismissed their petitions and they were thereupon automatically remanded to the custody of the sheriff of Lucas county; and this court is asked, in this proceeding, to reverse the Court of Appeals and discharge plaintiffs in error from custody.

Practically all the statutes empowering notaries public to take depositions and commit any one violating their lawful orders are attacked.

The administration of justice would be seriously impeded had not the General Assembly made some provision for the taking of depositions. As a part of the instrumentality for taking depositions, the Legislature created the office of notary public and made it appointive. There was reason for this enactment. A notary public, above all officers, should not be under any obligation to the electorate of his county. A notary public is appointed by the Governor, on the certificate of the common pleas judge of the county for which he is appointed, which judge must have personal knowledge of his good moral character and his [fol. 88] ability to perform the duties of the office, or ascer-

tain same by an examination prescribed by the rules of court.

No requirement as to fitness is required of a justice of the peace. If the individual who is a candidate for the office of justice of the peace in his township secures the greater number of votes, he is justice of the peace, regardless of fitness, and he is a judicial officer with power to "hear and determine," and undoubtedly with power to commit for contempt of his court.

Can it be said that the Legislature has no authority to delegate the power to commit to a notary public, notwithstanding his fitness, just because he has no power to "hear and determine?"

Our forebears, with uncanny wisdom, gave us the legislative, executive and judicial functions of government, and intended that they should operate as "checks and balances." During our formative period, the courts, federal and state, viewed with jealousy any attempt on the part of Congress or a state Legislature to delegate the powers inherent in one branch of government to another. Our rapid expansion made necessary the creation of many new offices and they were created, probably too many of them; but had not the courts relaxed to some extent the rule requiring the powers of government to be kept sacredly separate, we would have had many more of them.

It would not be necessary to go beyond the confines of Ohio to find scores of instances wherein one branch of government has been invested with the powers of another. This departure had to be made as a matter of public exigency.

A notary public is a ministerial officer, as that term has been understood so long that "the memory of man runneth not to the contrary." Some worth-while authorities insist that the word "ministerial" means nothing, as applied to an officer—that our officers are legislative, executive and judicial. Under this strict nomenclature we must [fol. 89] hold that a notary public is an executive officer, clothed with such power as the Legislature, within its constitutional limitations, saw fit to delegate to him.

Is the power to commit, delegated to notaries public, a judicial function? We think not. It is so circumscribed by legislative enactment that there is little room remaining within which to exercise the only judicial function, if

it by any stretch of the imagination could be called a judicial function, whether he will or will not commit.

That is not all. We are not so sure that the section under which commitment by a notary is authorized is not a mandatory statute, notwithstanding the language used is directory.

Section 11512, General Code, provides that the notary "may fine" or "may imprison" for disobedience of the order of a subpœna or for refusal to testify. While language is helpful in determining whether a statute is mandatory or directory, it is by no means conclusive. The true test is the legislative intent. What is the purpose of the statute? What did the Legislature intend that it should accomplish?

The purpose of depositions is threefold: First, to obtain the testimony of witnesses beyond the jurisdiction of the court; second, to perpetuate testimony; and, third, to operate as a bill of discovery.

The Legislature evidently sought to provide a means whereby a litigant's rights would be preserved in a case the exigencies of which would prevent him from producing his testimony in court in the regular way; to compel the production of testimony that might be forever lost; and to afford an opportunity to the litigant to secure evidence of facts necessary to make out his case, which evidence was peculiarly within the knowledge, or if documentary, in the possession and control of his adversary.

Under these enactments the litigant is entitled to these rights as a matter of law. He undertakes to assert them. [fol. 90] Notices are regularly served to take depositions of the officers of an adversary corporation. Subpœnas are regularly served. One officer appears in obedience to his subpœna, and refuses to testify. Two other officers refuse to appear. The litigant requests the notary to fine or commit the recalcitrant witnesses under such circumstances, and the notary flatly refuses to either fine or commit—must the litigant stop here and proceed anew before another notary or can he not resort to a court of record and by mandamus compel the notary to do his duty?

The witness is given the right to have the assessment of his fine or his commitment inquired into by a court of com-

petent jurisdiction. Is the door of the law closed to the litigant?

We are not holding Section 11512, General Code, to be a mandatory statute, as it is not necessary so to do in this case.

The plaintiff in the action in which it was sought to take these depositions was not at all modest in her demands. The subpœnas duces tecum did call for the production of a mass of testimony, but it must be remembered that this is an action alleging fraudulent conspiracy, and, from the allegations of the petition, the range of the testimony was necessarily large.

The allegations of this petition are sufficient to authorize an inspection of all records, documents and correspondence of the Woolson Spice Company from the time Hermann Sielcken became connected with the corporation until his death. This would include evidence of inducement whereby he was encouraged to connect himself with the corporation, if such evidence existed, as well as evidentiary matter since his death that lent light to the alleged fraudulent transactions during his lifetime.

In the absence of any question of privilege, we do not regard the scope of these subpœnas as unreasonably com- [fol. 91] prehensive, or that they constitute unlawful search and seizure.

Clara Sielcken Schwarz as widow and sole residuary legatee of Hermann Sielcken, deceased, upon the refusal of his personal representative to institute the action, had full right and capacity to file and maintain the action brought by her. To hold otherwise would be to place heirs, legatees and devisees at the mercy of capricious administrators, executors and trustees. On this proposition we are content with the authorities cited by the learned Court of Appeals which heard the case: 24 Corpus Juris, 797, Section 1981; 11 Ruling Case Law, 262, Section 297; 22 L. R. A. (N. S.), 458, note; and 20 Ann. Cas., 96.

Whether the petition is demurrable, or the action is barred by the statute of limitations, or Clara Sielcken Schwarz should not prevail in her suit because of laches, furnish no plausible pretext, and certainly no defense to Bevan, Koehrman and Stranahan for the disobedience of the orders of their subpœnas, in the face of Section 11526, General Code, which provides, in substance, that deposi-

tions may be taken at any time after the service of summons.

The right to examine these relators, either orally or by deposition, as upon cross-examination, is statutory, and its exercise does not necessarily constitute a "fishing expedition." Neither of these sections is in contravention of the federal or state Constitutions.

The fact that all parties defendant were not served with summons when their depositions were sought to be taken can make no difference so far as the relators are concerned, if they have been so served.

The contention that the notary who committed the relators was disqualified because of interest is not tenable, and does not come within the purview of Tumey v. Ohio, 273 U. S., 510, 47 S. Ct., 437, 71 L. Ed., 749, 50 A. L. R., 1243.

The review of the action of the notary in committing [fol. 92] relators as provided by Section 11514, General Code, afforded them due process. In addition, the right and opportunity to object to any and all testimony taken by the notary, as being irrelevant, incompetent, or privileged, was preserved to them in the trial court, and they had due process of law.

It has been heretofore held by this court that a notary public, in committing a witness to jail for refusing to answer questions, and in issuing an attachment for a witness who disobeys the order of his subpœna, does not exercise judicial power, and we see no good reason why we should depart from this long-established rule: De Camp v. Archibald, 50 Ohio St., 618, 35 N. E., 1056, 40 Am. St. Rep., 692; Benckenstein v. Schott, Sheriff, 92 Ohio St., 29, 110 N. E., 633.

These cases are likewise sufficient answer to the claim that Sections 11510, 11511 and 11512, General Code, are violative of the state and federal constitutions in denying due process of law.

We find no prejudicial error in the record of any of these cases, and the judgment of the Court of Appeals in each and all of them is affirmed.

Judgments affirmed.

Day, Allen, Jones and Matthias, JJ., concur.

Weygandt, C. J., and Kinkade, J., not participating.

[fol. 93] Reporter's Certificate to foregoing paper omitted in printing.

[fol. 94] In Court of Lucas County

C. A. No. 2693

Appearance Docket No. 6, Page 193

Ex Parte Robert A. Stranahan

Marshall, Melhorn, Marlar & Martin.
Tracy, Chapman & Welles.

Docket Entries—Filed Supreme Court of Ohio, July 23, 1932

1932

June 14. Petition for Writ of Habeas Corpus filed.
June 14. Writ of Habeas Corpus granted. Bond fixed at $100.00. Jour. 7-276.
June 14. Præcipe filed Writ of Habeas Corpus issued and delivered Sheriff.
June 15. Writ of Habeas Corpus filed, endorsed as follows, viz.: Received this writ June 14, 1932, at 10:45 a. m. and pursuant to its command I do now have this 15th day of June, 1932, at 9:30 a. m. the body of Robert A. Stranahan before the Court of Appeals of Lucas County, Ohio. I certify that the cause and reason for my having the said Robert A. Stranahan in custody arises from and is because of a writ and commitment papers issued and delivered to me by William Purcell, Notary Public, Lucas County, Ohio. Which said writ and commitment papers I hereto attach and make a part hereof as completely as though fully rewritten herein. Joseph Zimmerman, Sheriff, by Rolland Staggemeier, Deputy. .91.
June 15. Amendment to Petition for Writ of Habeas Corpus filed.
June 17. Recognizance filed.

June 22. Petition of Petitioner dismissed. Robert A. Stranahan, Petitioner, remanded to custody of Joseph Zimmerman, Sheriff, Petitioner to pay costs. Petitioner excepts. Jour. 7-285.

June 22. Motion for New Trial filed.

June 22. Motion for new trial overruled. Petitioner excepts and is given leave to file Bill of Exceptions. Jour. 7-286.

June 23. Bill of Exceptions of Petitioner filed.

June 23. Time waived Bill of Exceptions presented to the Court of Appeals.

[fol. 95]

June 23. Bill of Exceptions returned by Court of Appeals.

June 27. Motion to stay execution of Judgment and order filed.

June 29. Above motion denied. Petitioner excepts. Jour. 7-292.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 96] In Court of Appeals of Lucas County, Ohio

At a term of the above-named court, begun and held before the Hon. Harry W. Lloyd, Hon. Silas S. Richards, Hon. Roy H. Williams, Presiding Judges, on the 16th day of May, A. D. 1932, among other proceedings had by and before said Court on the 14th day of June, A. D. 1932, being the 25th day of said term, as appears by its Journal of that day, were the following, viz.:

Journal Entries

C. A. No. 2693

Ex Parte Robert A. Stranahan

On application of Robert A. Stranahan upon his filing the petition herein, a writ of habeas corpus is hereby granted as prayed for in said petition, returnable at 9:30 a. m. Wednesday, June 15, 1932.

Bond is fixed in the sum of $100.00, personal cognizance.

Court of Appeals, by Harry W. Lloyd, Presiding Judge.

In Court of Appeals of Lucas County

C. A. No. 2693

Ex Parte Robert A. Stranahan

Judgment—June 22, 1932

Now came the respondent herein, Joseph Zimmerman, Sheriff of the County of Lucas and State of Ohio, and made return of the writ of habeas corpus heretofore issued in this case, and also brought the body of the said Robert A. Stranahan petitioner herein.

Whereupon the court having heard and considered the evidence offered by the petitioner and the respondent, the arguments of counsel and being fully advised in the premises, finds that the said Robert A. Stranahan, is lawfully detained and imprisoned by the said Joseph Zimmerman, Sheriff of Lucas County, Ohio.

It is, therefore, ordered, adjudged and decreed that the [fol. 97] petition of the said petitioner, Robert A. Stranahan, be and the same hereby is dismissed, and he is remanded to the custody of the said Joseph Zimmerman, Sheriff of Lucas County, Ohio; and it is further ordered that the said petitioner pay the costs of this proceeding.

To all of which orders, judgments and decrees of the court the said petitioner, Robert A. Stranahan, excepts.

On the 22nd day of June, 1932, being the 32nd day of the May Term, 1932, an Order in said cause was rendered, an entry of which appears on the Journal of said Court, in the words and figures as follows, to-wit:

C. A. No. 2693

Ex Parte Robert A. Stranahan

This cause came on to be heard on the petitioner's motion for a new trial and was submitted to the court. Upon consideration thereof the court finds that said motion is not well taken and the same ought to be and hereby is overruled; to which action and order of the court the petitioner

objects and excepts, and upon his application is given leave to prepare and file a bill of exceptions herein.

On the 29th day of June, 1932, being the 38th day of the May Term, A. D. 1932, an Order in said cause was rendered, an entry of which appears on the Journal of said Court, in the words and figures as follows, to-wit:

C. A. No. 2693

Ex Parte Robert A. Stranahan

The petitioner's motion for an order suspending and staying execution of the judgment of this court discharging the writ of habeas corpus and remanding him to the custody of the Sheriff of Lucas County and dismissing his petition, having this day come on for hearing, the Court finds that said motion is not well taken and that it should be and the same is hereby denied.

To all of which petitioner excepts.

[fol. 98] No other Judgments or Decrees were rendered or Orders or Journal Entries made in said cause, as appears upon the Journal of said Court.

In testimony whereof I hereunto subscribe my name and affix the Seal of said Court at Toledo, Ohio, this 29th day of June, A. D. 1932.

Geo. E. Hardy, Clerk, (Signed) by Gladys Hirschy, Deputy. (Seal.)

The State of Ohio,
Lucas County, ss:

I, Geo. E. Hardy, Clerk of the Common Pleas and Courts of Appeal within and for the County of Lucas and State of Ohio, do hereby certify that the above foregoing Exhibits numbered 1 to 10, inclusive, contain all the original Pleadings, Process Papers and Records, and a full and true Transcript of all the Docket and Journal Entries in said cause and proceeding in said Court and in the Court of Common Pleas of said County, in cause No. 2693 C. A. Ex Parte, Robert A. Stranahan.

In testimony whereof I hereunto subscribe my name and affix the Seal of said Court at Toledo, Ohio, this 29th day of June, A. D. 1932.

Geo. E. Hardy, Clerk, (Signed) by Gladys Hirschy, Deputy. (Seal.)

[fol. 99] IN COURT OF APPEALS OF LUCAS COUNTY, OHIO

C. A. 2693

EX PARTE ROBERT A. STRANAHAN

PETITION FOR WRIT OF HABEAS CORPUS—Filed June 14, 1932

Your petitioner, Robert A. Stranahan, respectfully represents that he is unlawfully imprisoned and restrained of his liberty by Joseph Zimmerman, Sheriff of Lucas County, Ohio, in the County Jail of said county, without any legal authority, but under color of a pretended attachment issued by one William Purcell, styling himself a Notory Public in and for the County of Lucas, State of Ohio, a copy of which alleged attachment is attached hereto.

Your petitioner further says that he is advised by counsel that the pretended subpœna purporting to require his attendance before William Purcell, Notary Public, is wholly illegal and void and that no questions which could be asked him and no answer he might give would be relevant or material to any issue in said cause of Clara Sielcken Schwarz v. The Woolson Spice Company, et al., No. 131925 in the Common Pleas Court of Lucas County; that petitioner is informed and believes, and therefore avers, that proper service of notice of the taking of said pretended deposition, such as to make it admissible in evidence on the trial of this cause, has not been made; that petitioner is a resident of Lucas County, Ohio, in good health, and in every way capable of and expecting to appear at the trial of this cause in the Court of Common Pleas of Lucas County, Ohio, if called as a witness.

Petitioner further avers that William Purcell, the Notary Public before whom said depositions were, according to said pretended notice, to be taken, has attempted to exercise judicial power in violation of Section 1 of Article IV of the Constitution of Ohio by issuing the warrant for the arrest of your petitioner under which petitioner is, as aforesaid, now unlawfully restrained of his liberty by the Sheriff of this county. Petitioner says that he has been [fol. 100] deprived of his liberty without due process or course of law and in violation of Section 1 of Article IV, Section 14 of Article I and Section 16 of Article I of the Constitution of the State of Ohio and of the Fourteenth amendment to the Constitution of the United States.

Petitioner further says that one of the defendants in said cause did on the 11th day of June, 1932, file a demurrer to the petition therein upon the grounds, among others, that plaintiff has not legal capacity to sue, and that the petition does not state facts showing a cause of action, and did on the said date file a brief in support of said demurrer, which said demurrer is pending in said Court of Common Pleas of Lucas County, Ohio, and certain of the defendants in said cause did, on or about the 4th day of June, 1932, file in said cause a motion to quash notice to take depositions and subpœnas duces tecum, and for an injunction, enjoining and restraining plaintiff and her attorneys from taking depositions in said cause until such time, if any, as might be fixed by said Court of Common Pleas for so doing, which said motion and a supplement thereto praying for an injunction against the further taking of the aforesaid deposition, are now pending before said Court of Common Pleas. Said demurrer, motion and supplement to said motion have not been decided and no orders have been issued upon them.

Petitioner is advised and says that said demurrer, motion and supplement to said motion, are well taken and should be sustained and granted.

Petitioner further says upon information and belief that plaintiff was not in good faith in attempting to take his testimony, as aforesaid, and that it was not the intention of plaintiff or her expectation that said testimony should be transcribed or used in the trial of said cause, except for the purpose of endeavoring to learn and ascertain facts and information to which plaintiff is not lawfully entitled, and for the purpose of endeavoring to learn and ascertain the means by which certain of the defendants in said cause expected and intended to establish their defenses to the alleged claims asserted by plaintiff in her petition against said defendants.

Wherefore, petitioner prays that a writ of habeas corpus be issued to the said Joseph Zimmerman, Sheriff of Lucas County, Ohio, and that petitioner be discharged from said [fol. 101] imprisonment and restraint of his liberty.

Marshall, Melhorn, Marlar & Martin, Tracy, Chapman & Welles, Attorneys for Petitioner.

Duly sworn to by Robert A. Stranahan. Jurat omitted in printing.

[fol. 102] IN COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

No. 131,925

CLARA SIELCKEN-SCHWARZ, Plaintiff,

vs.

THE WOOLSON SPICE COMPANY et al., Defendants

NOTARY'S ORDER OF ATTACHMENT

To the Sheriff of Lucas County, Ohio:

Whereas, in a certain action pending in the Common Pleas Court of Lucas County, Ohio, wherein Clara Sielcken Schwarz is plaintiff, and The Woolson Spice Company, et al., are defendants, the plaintiff filed with me a Notice to the defendants that it would, on the 13th day of June, 1932, take depositions on sundry witnesses at the office of Fraser, Hiett, Wall & Effler, 710 Home Bank Building, Toledo, in the County of Lucas, the State of Ohio, before me as Notary Public.

And, whereas, on the 7th day of June, 1932, at the request of the plaintiff, I issued a subpœna in said action whereby Robert A. Stranahan was commanded to appear before me, a Notary Public in and for the County of Lucas, Ohio, at the said office of Fraser, Hiett, Wall & Effler, Toledo, Ohio, therein on the 13th day of June, 1932, at 9:30 o'clock A. M., then and there to give evidence and the truth to say in a certain action wherein said Clara Sielcken Schwarz, is plaintiff, and The Woolson Spice Company, et al., are defendants.

And, whereas, said subpœna on the 7th day of June, 1932, was personally served on the said Robert A. Stranahan by myself, and fully appears by said return in the form of my affidavit endorsed thereon.

And, whereas, the said Robert A. Stranahan failed to attend, in obedience to said subpœna, as he was summoned to do.

You are therefore commanded to attach the said Robert A. Stranahan so as to have his body before me, William Purcell, a Notary Public in and for Lucas County, Ohio, [fol. 103] at the said office of Fraser, Hiett, Wall & Effler,

710 Home Bank Building, Toledo, Ohio, forthwith, as well to answer the State of Ohio for said contempt in disobeying said subpœna, as to give his testimony in the action, in the recital of this writ mentioned, and have then and there this writ.

Given under my hand and official seal this 13th day of June, 1932.

(Signed) William Purcell, Notary Public, Lucas County, Ohio. (Seal.) (Rubber stamp) William Purcell.

[fol. 104] In Common Pleas Court of Lucas County, Ohio

Clara Sielcken-Schwarz, Plaintiff,

vs.

The Woolson Spice Company et al., Defendants

Subpœna

To Robert A. Stranahan, % Champion Spark Plug Company, Toledo, Ohio:

You are hereby commanded to be and appear before me, the undersigned, a notary public within and for the County of Lucas and State of Ohio on the thirteenth day of June, A. D. 1932, at 9:30 o'clock A. M., there to be cross-examined and the truth to speak on behalf of the plaintiff above named, at number 710 Home Bank Building at Madison & Huron Streets, in the City of Toledo, in said county, the taking of testimony to be adjourned from day to day should necessity require.

Hereof Fail Not under Penalty of Law.

Witness my hand and official seal at Toledo, Ohio, this 7th day of June, 1932.

William Purcell, Notary Public, Lucas County, Ohio.

A true copy.

[fol. 105] In Court of Appeals of Lucas County, Ohio

C. A. #2693

Ex Parte Robert A. Stranahan

Amendment to Petition for Writ of Habeas Corpus—Filed June 15, 1932

Now comes petitioner Robert A. Stranahan and by leave of court files this amendment to his petition for writ of habeas corpus herein and without waiving or in any extent abandoning any allegations in his original petition, alleges:

1. That a true copy of the petition in the cause of Clara Sielcken-Schwarz vs. The Woolson Spice Company, et al., No. 131925 in the Common Pleas Court of Lucas County, Ohio, referred to in petitioner's original petition herein, is hereto attached, marked "Exhibit A", and made a part hereof.

2. That for the reasons set forth in petitioner's original petition herein and for the additional reasons set forth in this amendment to said petition, William Purcell, the Notary Public by whose pretended order your petitioner was arrested and held by the Sheriff of Lucas County, Ohio, had no jurisdiction to take your petitioner's deposition in said cause, to issue a subpœna for your petitioner, to order your petitioner to answer any question or to make any order or issue any warrant for the arrest or imprisonment of your petitioner until he submit to testify in the premises, or otherwise.

3. That said Notary Public, as shown by his order of attachment attaching your petitioner and causing petitioner to be brought before him, assumed and attempted to exercise judicial power.

[fol. 106] 4. Said Notary Public, William Purcell, was wholly disqualified to make an order for the attachment of your petitioner and to cause petitioner to be brought before him under penalty of being punished for contempt for disobeying said subpœna, for the reason that said Notary Public had been employed by counsel for plaintiff in said suit of Clara Sielcken-Schwarz vs. The Woolson Spice Com-

pany, et al., to act as notary and stenographer in the taking of the deposition of your petitioner and the transcribing thereof and that the amount of the compensation of said Notary Public for such service was dependent in large part, if not wholly, upon the number of pages of such testimony or evidence by way of exhibits which he might take and transcribe or copy; that it was to the pecuniary interest of said Notary Public that he should compel your petitioner to testify before him so that such compensation might be earned by said Notary Public, and that said Notary Public was necessarily subject to the bias of his own personal pecuniary interest in determining whether or not an attachment should be issued for the bringing of petitioner before him to give his testimony in said action before said Notary Public, and for said reason said attachment was issued illegally and in violation of the Fourteenth Amendment of the Constitution of the United States.

5. That on the 14th day of June, 1932, after the Honorable Robert A. Gosline, Judge of the Court of Common Pleas of Lucas County, Ohio, before whom were pending the motions for injunctions, etc., referred to in your petitioner's petition herein, had been informed that this proceeding in habeas corpus was to be filed herein, announced that he would overrule said motions for injunction unless they were voluntarily withdrawn by the defendants in said cause who had filed same and thereupon said motions were withdrawn by said defendants.

6. Your petitioner says that the only color of authority which said William Purcell had for the issuance of the at- [fol. 107] tachment of your petitioner is by virtue of the provisions of Sections 11510, 11511 and 11512 of the General Code of the State of Ohio; that if said sections or any of them are or can be construed to authorize the issuance of said order of attachment herein by said William Purcell as Notary Public and as compelling the appearance of petitioner before said Notary Public to give testimony and produce books, papers and documents in pursuance of said order of attachment, then said sections of the statutes and each of them are void and unconstitutional by reason of the provisions of Section 1 of Article I, Section 5 of Article I, Section 10 of Article I, Section 14 of Article I, Section 16

of Article I, Section 1 of Article IV, and Section 32 of Article II of the Ohio Constitution and the Fourteenth Amendment of the Constitution of the United States, and are wholly ineffective to invest said Notary Public with lawful power or jurisdiction to take such actions and proceedings or any of them.

Wherefore your petitioner prays as in his petition herein.

Marshall, Melhorn, Marlar and Martin and Tracy, Chapman & Welles, Attorneys for Petitioner.

Duly sworn to by Robert A. Stranahan, jurat omitted in printing.

[fol. 108] Exhibit "A" to Amendment to Petition

In Court of Common Pleas of Lucas County

No. 131,925

Clara Sielcken-Schwarz, New York, N. Y., Plaintiff,

v.

The Woolson Spice Company, a Corporation, 2700 Summit Street, Toledo, Ohio; John W. Koehrman, 1719 Superior Street, Toledo, Ohio; Franklin H. Biggs, 2613 Glenwood Avenue, Toledo, Ohio; Marion M. Miller, 2260 Scottwood Avenue, Toledo, Ohio; Frank D. Stranahan, Dixie Highway, Toledo, Ohio; Robert A. Stranahan, Ottawa Hills, Toledo, Ohio; Ammi F. Mitchell, 2057 Glenwood Avenue, Toledo, Ohio; and Leroy E. Eastman, 3416 Brookside Road, Toledo, Ohio, as Administrators of the Estate of William A. Brigham, deceased; Irving Trust Company, a foreign corporation, as Executor of the last will and testament of Herman Sielcken, deceased, Society for Savings Building, Cleveland, Ohio, Defendants

Petition for Equitable Relief

The above named plaintiff, Clara Sielcken-Schwarz, for her cause of action against the above named defendants respectfully alleges and shows:

[fol. 109] 1. That the plaintiff, Clara Sielcken-Schwarz, at and prior to the time of the commencement of this action,

was and now is a citizen of the United States and a resident of the State of New York, residing in the City and County of New York in said State.

2. That the defendant, Irving Trust Company, is a corporation duly organized and existing under and by virtue of the laws of the State of New York and has its principal place of business in New York City in said State; that said corporation is duly qualified to do business in Ohio and has appointed a statutory agent pursuant to the Ohio statutes and that said corporation is doing business in this State.

3. That the defendant, The Woolson Spice Company, at all times hereinafter mentioned was, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of Ohio, and has its principal place of business at the City of Toledo, in said State; that at all times prior to, on or about July 25th, 1918, the total capital stock of said corporation consisted of 1,800 shares of common stock of a par value of One Hundred Dollars ($100.00) per share.

4. That the defendants, John Koehrman, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan and Robert A. Stranahan, are citizens and residents of the City of Toledo, County of Lucas, State of Ohio, and that the defendants Ammi F. Mitchell and Leroy E. Eastman are the duly qualified and acting administrators of the estate of William A. Brigham, deceased, who at the time of his death was a resident of the City of Toledo, County of Lucas, State of Ohio.

5. That Herman Sielcken, who was a citizen of the United States and domiciled in the City, County and State of New York, died on or about the 8th day of October, 1917, leaving a last Will and Testament wherein he appointed The Columbia-Knickerbocker Trust Company, a corporation [fol. 110] organized and existing under the laws of the State of New York, Executor of his said Will; that thereafter and on or about the 25th day of January, 1918, the said Will was duly admitted to Probate by the Surrogates Court of the County of New York, State of New York, and letters testamentary on the said Will were thereupon duly issued by one of said Surrogates to The Columbia Trust Company, a corporation organized and existing under the

laws of the State of New York, as the successor of said The Columbia-Knickerbocker Trust Company; that thereafter and prior to the commencement of this action the defendant, Irving Trust Company, by certain mesne changes of corporate name, became and now is the continuation of the corporate entity and identify of said Columbia Trust Company and thereupon became the duly qualified and acting Executor of said Last Will; that the defendant, Irving Trust Company, has never been discharged as such Executor and that no other individual or corporation has been appointed Executor of said Last Will or administrator of the estate of said Herman Sielcken by said Surrogates Court or by any other court.

6. That said Herman Sielcken, in and by his Last Will and Testament, after providing certain specific legacies all of which have been fully paid and satisfied, gave, devised and bequeathed all the rest, residue and remainder of his property and estate, real and personal, whatsoever and wheresoever situate, absolutely to his wife, Clara Sielcken (by subsequent remarriage Clara Sielcken-Schwarz) who is the plaintiff herein, and that said plaintiff is now the full, complete, absolute and sole beneficial owner of all unadministered and undistributed assets of the estate of said Herman Sielcken.

7. That since the death of the said Herman Sielcken the plaintiff remarried and her present name is Clara Sielcken-Schwarz.

8. That heretofore and prior to the commencement of this action, the plaintiff duly requested the defendant, Irving Trust Company, as Executor of the Last Will and Testament of said Hermann Sielcken, deceased, to bring [fol. 111] this action in behalf of said estate and sought to persuade said defendant so to do, but that the said defendant has failed, neglected and refused to bring said action, and, therefore, this plaintiff has joined said Irving Trust Company, as such Executor, as a defendant in this action.

9. That at the time of his death said Hermann Sielcken was the sole beneficial owner of 824 shares of the capital stock of the defendant, The Woolson Spice Company, said shares being registered on the books of the said corporation in the name of Crossman & Sielcken, under which name

the said Hermann Sielcken carried on business; that in addition to said 824 shares there was registered on the books of the said corporation in the name of said Hermann Sielcken, 360 of said shares.

10. That on the 6th day of April, 1917, the Congress of the United States declared that a state of war existed between the United States and Germany and on the 6th day of October, 1917, the Congress of the United States enacted and the President approved the Act known as "The Trading with the Enemy Act."

11. That said Hermann Sielcken at the outbreak of war between the United States and Germany was, as the defendants and said William A. Brigham well knew, temporarily present in Germany on business in behalf of the defendant, The Woolson Spice Company.

12. Plaintiff is informed and believes that the said Herman Sielcken in the year 1909 acquired by purchase thereof 1,739 shares of the common capital stock of the defendant. The Woolson Spice Company, out of the said total capitalization of 1,800 common shares; that said Hermann Sielcken from the year 1909 until in or about the month of September, 1917, was president and a director of the defendant, The Woolson Spice Company; that subsequent to the purchase by him of said 1,739 shares, said Hermann Sielcken [fol. 112] from time to time sold certain of said shares to various persons including the defendants, Koehrman and Biggs, and said William A. Brigham, but for a large portion of said shares so sold said Hermann Sielcken did not receive prior to his death the purchase price, including the purchase of the shares sold to said defendants, Koehrman and Biggs, and said Brigham, and held said shares so sold as collateral to secure the purchase price thereof; that prior to the ousting of said Hermann Sielcken as president of the defendant, The Woolson Spice Company, as hereinafter more specifically related, the said Brigham was secretary and a director, the defendant Koehrman was general manager and a director, and the defendant Biggs was superintendent and a director of the defendant, The Woolson Spice Company, and were intimately associated in the conduct of the affairs of said corporation with said Her-

mann Sielcken, who, as hereinbefore stated, owned or controlled a majority of the capital stock thereof and by reason of such control maintained the defendants, Koehrman and Biggs, and said Brigham, in their said positions; that because of their intimate association and acquaintance with the business of the defendant, The Woolson Spice Company, over a period of many years, the defendants, Koehrman and Biggs, and said Brigham were informed upon every detail of said business and well knew the prosperous condition of the affairs of the said corporation.

13. Plaintiff is informed and believes that in or about the month of September, 1917, it being well known to the defendants, Koehrman and Biggs, and said Brigham, that the said Hermann Sielcken was being detained in Germany by the exigencies of the said war between the United States and Germany, that the said Hermann Sielcken was then suffering from a prolonged and serious illness which prevented him from traveling, that even in the event of peace [fol. 113] between the United States and Germany his illness would indefinitely prevent him from returning to his domicile in the United States and that it would be impossible for him to frustrate their plans, said defendants, Koehrman and Biggs, and said Brigham, impelled by motives of avarice, ambition and hatred toward Hermann Sielcken, and in furtherance and as a part of a fraudulent conspiracy (conceived among them during the spring and summer of 1917) illegally and wrongfully to acquire the control of said The Woolson Spice Company from said Hermann Sielcken, and otherwise to defraud him and to dominate, manage, control, manipulate and exploit said corporation in their own interests, caused to be held a pretended meeting of the Board of Directors of the defendant, The Woolson Spice Company, and by means of their control of the said Board of Directors in the absence of said Hermann Sielcken and without his knowledge or authority wrongfully and fraudulently ousted the said Hermann Sielcken from his office as President of defendant, The Woolson Spice Company, and also wrongfully and fraudulently ousted from his office as Treasurer of defendant, The Woolson Spice Company, one, S. P. Jermain, who, in his capacity as said Treasurer, for many years had been a trusted and loyal representative, associate and

adviser of the said Hermann Sielcken, and proceeded to a pretended election of the said Brigham as President of defendant, The Woolson Spice Company; that thereafter and at all times mentioned herein and as a result of the aforesaid wrongful acts, the defendants, Koehrman and Biggs, and said Brigham controlled and dominated the defendant, The Woolson Spice Company, and controlled and regulated the public and private reports of its business, general condition and ownership of its stock, and did fraudulently manipulate the defendant, The Woolson Spice Company, and the said reports for their own purposes, as [fol. 114] hereinafter more specifically set forth.

14. Plaintiff is informed and believes that in justification of their action in ousting Sielcken and seizing control of The Woolson Spice Company and as a further step in the consummation of the said fraudulent conspiracy, the defendants, Kiehrman and Biggs, and said Brigham, although they well knew that said Hermann Sielcken in his life time and at the time of his death was a citizen of the United States and domiciled in the City, County and State of New York and was not an enemy within the meaning of that term as defined in the "Trading with the Enemy Act", and although they well knew that said Hermann Sielcken had died on October 8, 1917, and that title to all his property in the United States had vested in The Columbia Trust Company as Executor, falsely and maliciously caused to be publicly announced and reported to the Alien Property Custodian that the said Hermann Sielcken was a resident of Germany and an enemy of the United States under the provisions of said "Trading with the Enemy Act", and that said Hermann Sielcken was the owner of the shares of stock of said Woolson Spice Company hereinbefore mentioned; that the said defendants and said Brigham, by said false and malicious reports, intended to conceal and distract attention from their wrongful and fraudulent seizure of the control of The Woolson Spice Company in their own interests and hoped thereby to perpetuate and render easier and less likely of discovery their management, control, manipulation, and exploitation of said corporation in their own interests.

15. That upon the qualification of the said Columbia Trust Company as Executor of the said Last Will and

Testament of the said Hermann Sielcken and for the purposes of the due administration and distribution of said estate, title to the said 824 shares of stock of the defend-
[fol. 115] ant, The Woolson Spice Company, and title to the interest of said Hermann Sielcken in said 360 shares of said stock, vested in said Columbia Trust Company as such executor.

16. Plaintiff is informed and believes that prior to or shortly after the appointment of The Columbia Trust Company as executor as aforesaid, the defendants, Koehrman and Biggs, and said Brigham broadened and enlarged the scope of their fraudulent conspiracy to include a plan to acquire the said 824 shares and the said 360 shares of the capital stock of the defendant, The Woolson Spice Company, for a grossly inadequate consideration for themselves and the defendants, Miller, Frank D. Stranahan and Robert A. Stranahan, to whom the said plan was communicated and who aided, abetted and participated in said fraudulent plan.

17. Plaintiff is informed and believes that in furtherance of said fraudulent conspiracy, wrongfully and illegally to acquire said stock at a grossly inadequate consideration, the defendants, Koehrman and Biggs, and said Brigham, aided and abetted by sundry other persons, and taking advantage of their wrongful control and domination over the affairs of the defendant, The Woolson Spice Company, and taking advantage of their peculiar and superior knowledge of the affairs of said Company and of the necessity of the said Executor to rely upon them for information concerning the business of said Company, carried on a campaign of misrepresentation calculated and designed to mislead and deceive the said Executor as to the value of said stock and as to the necessity of an immediate sale to avoid practically total loss. Plaintiff is further informed and believes that as part of said campaign of misrepresentation said individual defendants and said Brigham falsely and fraudulently misrepresented to said Columbia Trust Com-
[fol. 116] pany, as such Executor, that said stock was of small and constantly decreasing value, although in truth and in fact, as such defendants and said Brigham well knew, said stock was of a value of upwards of $2,000.00 per share and was constantly appreciating in value, that the fact that the Estate of Hermann Sielcken, who said defendants

falsely and wrongfully asserted had been an alien enemy, owned the said 824 shares of stock which had theretofore been transferred into the name of said Trust Company as such Executor, had seriously injured and was progressively injuring the business of the defendant, The Woolson Spice Company, that such circumstances had seriously depreciated and was progressively depreciating the value of said stock, that an immediate sale was necessary to save the business from destruction, that orders were being cancelled daily, that unless an immediate sale were made the said stock could not be sold at all and that only a very small amount would then be realized through liquidation. Plaintiff is further informed and believes that the individual defendants and said Brigham well knew that the business of the defendant, The Woolson Spice Company, had not been injured and depreciated, but on the contrary was in a very prosperous condition, that the volume of said business had largely increased over the preceding year, that said Company had large contracts for furnishing coffee, spices and supplies to the armies of the United States, that unusual profits were anticipated, and that said stock had not depreciated in value, but on the contrary, would, as the individual defendants and said Brigham well knew, be largely increased in value so soon as the secret knowledge of such defendants and said Brigham as to the increased business and the prosperity of the defendant, The Woolson Spice Company, should become known to the public generally. Plaintiff is further informed and believes that said false and wrongful misrepresentations were intended to [fol. 117] and did cause said Columbia Trust Company, as such Executor, which was unfamiliar with the affairs and business of said corporation, and which necessarily as a fiduciary stockholder of such corporation relied upon the reports, statements and representations of the defendants and said Brigham, who were the managing officers and directors of said corporation as aforesaid, as to the condition of its affairs, to believe that it would be impossible to secure a substantial price for the said stock, that said stock had greatly depreciated in value and was constantly depreciating in value, and that an immediate sale of said stock was necessary to avoid a total loss of said asset of the said estate. Plaintiff is further informed and believes that

as a result of the aforesaid misrepresentations so relied upon the Executor was fraudulently induced to sell said stock to the individual defendants and said Brigham for a grossly inadequate price, as hereinafter more particularly set forth.

18. Plaintiff is informed and believes that in furtherance of said conspiracy the individual defendants and said Brigham, conspiring among themselves and with sundry other persons, falsely and fraudulently represented to and advised The Columbia Trust Company that any publicity regarding a sale of said shares or any attempt to obtain purchasers for said shares, other than said individual defendants and said Brigham, would react disastrously on the business of said Woolson Spice Company and the value of said shares; that thereby said Columbia Trust Company, as such Executor, was misled and induced to refrain from calling said shares to the attention of other persons who might be interested therein as purchasers and to refrain from advertising the fact that said shares of stock were for sale, and was thereby misled into making a hurried sale [fol. 118] of said shares to said defendants Koehrman, Biggs, Miller, Frank D. Stranahan and Robert A. Stranahan and to said Brigham, without competition, publicity or adequate advertising in the press, for a grossly inadequate price; that said defendants and said Brigham, who were the directors and managing officers of The Woolson Spice Company, and the other individual defendants associated with them in said fraudulent conspiracy, took advantage of the peculiar knowledge of said officers as to the prosperity of the defendant, The Woolson Spice Company, and the value of its stock, to acquire the shares of such fiduciary stockholder, The Columbia Trust Company, for a grossly inadequate price.

19. Plaintiff is informed and believes that in furtherance of said conspiracy the defendants, Koehrman and Biggs, and said Brigham conspiring among themselves and sundry other persons, falsely and fraudulently represented to and threatened The Columbia Trust Company that unless said shares were immediately sold to the individual defendants and said Brigham at a price fixed by them or if said shares were sold to any other person or persons, then they, the managing officers and directors of the defendant, The

Woolson Spice Company, would forthwith leave the employ of said corporation and involve it in immediate disaster and ruin; that thereby said Columbia Trust Company, as such executor, was misled and wrongfully coerced into making a hasty sale of said shares to the said individual defendants and to said Brigham at a grossly inadequate price fixed by them and upon their own terms and without attempting to obtain bids from other possible purchasers.

20. Plaintiff is informed and believes that as part of and in furtherance of said conspiracy to acquire said shares at a grossly inadequate price, the defendants, Koehrman and Biggs, and said Brigham falsely and fraudulently mis- [fol. 119] represented the condition of said Company to other prospective purchasers of said stock and attempted to and did effectively foreclose competition by such misrepresentation and by making threats to prospective purchasers that if such prospective purchasers competed with the individual defendants and said Brigham in the matter of the acquisition of said shares, then the management of the defendant, The Woolson Spice Company, would immediately quit and involve the corporation in chaos and ruin.

21. Plaintiff is informed and believes that in furtherance of said fraudulent conspiracy the defendants, Koehrman and Biggs, and said Brigham attempted to conceal from said Columbia Trust Company, and as officers and directors of defendant, The Woolson Spice Company, prevented said corporation from disclosing to The Columbia Trust Company the existence of an alleged claim in favor of the defendant, The Woolson Spice Company, or that said corporation asserted an alleged claim against the estate of Hermann Sielcken in a sum in excess of Nine Hundred Thirty-two Thousand Dollars ($932,000.00). Plaintiff is further informed and believes that when prior to the said sale of said shares of The Woolson Spice Company to the individual defendants and said Brigham, The Columbia Trust Company, as such Executor, learned of the existence of said alleged claim from other sources, said individual defendants and said Brigham falsely and fraudulently represented to and assured The Columbia Trust Company that said alleged claim had little if any merit and that a recovery thereon, if any, would be of a negligible amount, although said individual defendants and said Brigham then believed

they could and intended to take advantage of the death of [fol. 120] Hermann Sielcken, the circumstance that they were the sole survivors who had personal knowledge of many of the relations between the defendant, The Woolson Spice Company, and Hermann Sielcken in his life time, and their complete domination and control over the defendant, The Woolson Spice Company, its books, papers and records to enable said defendant, The Woolson Spice Company, through their connivance and assistance successfully to prosecute such alleged claim and recover from the estate of Hermann Sielcken a sum in excess of Nine Hundred Thirty-two Thousand Dollars ($932,000.00), and further falsely and fraudulently represented to and assured The Columbia Trust Company that neither they nor the defendant, The Woolson Spice Company, had any intention to assert said alleged claim against the estate of Hermann Sielcken, either presently or after the sale of said shares, although said individual defendants and said Brigham well knew that the defendant, The Woolson Spice Company, was at the time of such representations and assurances intending and planning to assert said claim as soon as the sale of said shares should be consummated, and although said individual defendants and said Brigham, as officers, directors, shareholders and prospective shareholders of defendant, The Woolson Spice Company, were at the time of making such representations and assurances intending to force and compel the defendant, The Woolson Spice Company, to assert said alleged claim as soon as the sale of said shares should be consummated. Plaintiff is further informed and believes that the individual defendants and said Brigham, by means of such and sundry other false and deceitful representations, assurances and advices, misled, induced and wrongfully prevailed upon The Columbia Trust Company as such Executor, to make a hurried sale of such shares to [fol. 121] the individual defendants and to said Brigham without asking an adequate or thorough investigation of said alleged claim, or without judicially determining or settling the same. Plaintiff is further informed and believes that said individual defendants and said Brigham so attempted to conceal such alleged claim, so prevented The Woolson Spice Company from divulging the same, made such false representations and deceitful assurances and caused said corporation to delay asserting said alleged

claim against the estate of said Hermann Sielcken until after the consummation of said sale in order that the value of said shares might not thereby be increased because of the existence of said alleged claim or by the fruits thereof, should the same be settled or judicially determined prior to said sale. Plaintiff is further informed and believes that the defendant, The Woolson Spice Company, aided and abetted the individual defendants and said Brigham in consummating said conspiracy to purchase the aforesaid shares for a grossly inadequate price, actively participated therein and delayed asserting said alleged claim against the estate of Hermann Sielcken in order that the individual defendants and said Brigham might acquire the controlling interest in said corporation prior to the assertion of said alleged claim, in the expectation and with the purpose of thereby more effectively prosecuting said claim against the estate of said Hermann Sielcken. Plaintiff is further informed and believes that subsequent to the sale of said shares the said individual defendants and said Brigham caused the defendant, The Woolson Spice Company, to assert and the said corporation did assert the said claim against the said estate and instituted an action in the Supreme Court of the State of New York against said Columbia Trust Company as such Executor, to recover said amount, and that thereafter such proceedings were had in the said action that said Columbia Trust Company, as such [fol. 122] executor, settled and compromised the said claim by the payment to the defendant, The Woolson Spice Company, of the sum of Two Hundred Eighty-four Thousand Six Hundred Eighty-nine and 16/100 Dollars ($284,689.16) from the funds of the estate, no part of which sum was taken into consideration on arriving at the value of said stock.

22. Plaintiff is informed and believes that, it being well known to said individual defendants and to said Brigham that certain loyal personal and business friends, associates and trusted advisers of the said Hermann Sielcken, including John Doyle, general counsel and former director of the defendant, The Woolson Spice Company, and Joseph Picksley, director and stockholder of The Woolson Spice Company, would exert their powers and influence to prevent a sale of said shares at the grossly inadequate price of ap-

proximately Six Hundred Eighty Dollars ($680.00) per share contemplated by said individual defendants and said Brigham and it being feared by said individual defendants and said Brigham that if said friends, associates and advisers of the said Hermann Sielcken were forewarned of said sale and said proposed price they might thwart said conspiracy by correctly informing the Columbia Trust Company as to the value of said shares and as to the existing and expected prosperity of The Woolson Spice Company, and by informing it of other persons who would be interested in purchasing said shares, the said individual defendants and said Brigham, in furtherance of said fraudulent plan to acquire said stock and conspiring among themselves and with sundry other persons, concealed from the said friends, associates and advisers of Hermann Sielcken the facts that said shares of stock were for sale and that they contemplated purchasing the same, the price which they planned to pay for said shares and all the details arranged in connection with said sale as hereinabove and hereinafter more specifically set forth, and by means of the aforesaid and sundry other false and deceitful misrepresentations, advices, assurances, concealments and threats, [fol. 123] induced The Columbia Trust Company, as such executor, to conceal said facts, price and details from the said friends, associates and advisers of Hermann Sielcken.

23. Plaintiff is informed and believes that in consummation of said conspiracy the individual defendants and said Brigham, aided and abetted by sundry other persons, by means of the aforesaid false and deceitful misrepresentations, advices, assurances, concealments and threats, induced The Columbia Trust Company, as such Executor, to enter into a private agreement to sell said shares to the individual defendants and to said Brigham at the grossly inadequate price of $680.00 per share, although, as said defendants and said Brigham well knew, the market value of said stock was approximately $2,000.00 per share.

24. That thereafter, as plaintiff is informed and believes, the individual defendants and said Brigham, conspiring among themselves and with sundry other persons, coerced and misled the Executor into consenting to a pretended auction sale (at which in fact competitive bidding had been

foreclosed as hereinafter set forth) for the purpose of concealing the private contract of purchase of said shares of The Woolson Spice Company which said individual defendants and said Brigham had obtained through the fraud, deception and coercion practiced upon said Executor and to create an appearance that said sale rested upon a public auction in the hopes of foreclosing inquiry into the private contracts of sale so effectuated through the fraud of said individual defendants and said Brigham.

25. Plaintiff is informed and believes that shortly prior to the 24th day of July, 1918, said individual defendants and said Brigham were advised by The Columbia Trust [fol. 124] Company that said 824 shares and said 360 shares would be put up for sale at auction in the City of New York on July 24, 1918, that thereupon in furtherance of said conspiracy and for the purpose of chilling the bidding at said auction sale, said individual defendants, said Brigham and sundry other persons, each of whom was a prospective bidder for said shares, and all of whom were aided and abetted by sundry other persons, wrongfully and fraudulently agreed among themselves that one of their number, to-wit, the defendant, Marion M. Miller, would bid for and purchase said shares without competition from the other individual defendants and said Brigham and said other persons and that upon the acquisition of said shares by the said Marion M. Miller, the same should be divided among said individual defendants, said Brigham and said other persons; that in compliance with said wrongful agreement the defendant, Marion M. Miller, attended said auction sale and purchased said shares without competition at a grossly inadequate price, said other individual defendants, said Brigham and other persons, in accordance with said agreement, refraining from bidding therefor, and that forthwith said shares were divided among the said conspirators as theretofore agreed upon.

26. Plaintiff is informed and believes that in order to further wrongfully chill the bidding at said auction sale said individual defendants and said Brigham conspiring among themselves and sundry other persons, by means of the aforesaid false and malicious representations, assurances, advices, concealments and threats, induced The Co-

lumbia Trust Company, as such Executor, to refrain from making any extensive or adequate advertising of said auction and to make certain special arrangements and agreements with them as to the terms of said auction sale, to-wit, that said individual defendants, and said Brigham were to be permitted to make a deposit of $100,000.00 with The Columbia Trust Company as a down payment on said shares [fol. 125] and were to be allowed thirty days after said auction within which to pay the balance of their purchase price, whereas, the public and all other prospective purchasers were to be required to deposit 10% of their bids with the auctioneer at the time of the sale, and to pay the balance thereof to such auctioneer before one o'clock on the day following said sale.

27. Plaintiff is informed and believes that on or about the 24th day of July, 1918, said Columbia Trust Company, as such Executor, misled, deceived and coerced by the aforesaid false and malicious misrepresentations, assurances, advices, concealments and threats of said individual defendants and said Brigham, put up the said 824 shares and said 360 shares at auction in the City of New York, and, without adequate notice or advertisement of said sale, sold said 824 shares and said 360 shares without competition to the defendant, Marion M. Miller, on behalf of himself and said other individual defendants and said Brigham, at the terms theretofore agreed upon as aforesaid at the price of Six Hundred Eighty Dollars ($680.00) per share, although the said individual defendants and said Brigham knew that the market value of said stock was approximately Two Thousand Dollars ($2,000.00) a share.

28. That thereafter the said Columbia Trust Company, as such Executor, still being misled, deceived and coerced by the aforesaid false and malicious misrepresentations, assurances, advices, concealments and threats of the individual defendants and said Brigham, caused to be presented to the defendant, The Woolson Spice Company, certificates for the said shares of stock, and said defendant, The Woolson Spice Company, with full knowledge that the transfer of said stock was the consummation of a gross fraud upon said Executor by the individual defendants and said Brigham, and with the expectation of deriving certain

improper and unjustifiable benefits therefrom, as hereinbefore more particularly set forth thereupon actively aided, [fol. 126] abetted and participated in the consummation of said fraud and wrongfully and illegally transferred said stock into the names of the individual defendants and said Brigham and/or their nominees and caused certificates therefor to be issued and delivered accordingly.

29. Plaintiff is informed and believes that prior to the purchase of said shares as aforesaid and in furtherance of said conspiracy to acquire the same at a grossly inadequate price, the said individual defendants and said Brigham having insufficient means with which to effect said purchase without assistance, knowing full well that the defendant, The Woolson Spice Company, was in a position to make a large cash distribution by way of dividends and/or to borrow large sums from sundry financial institutions, and taking advantage of their peculiar knowledge of the condition and affairs of the defendant, The Woolson Spice Company, and of their control and domination over said corporate defendant as aforesaid, conspired and arranged with the defendant, The Woolson Spice Company, and sundry other persons that upon the consummation of the aforesaid sale the defendant, The Woolson Spice Company, would procure and advance and/or distribute to the individual defendants and to said Brigham sufficient funds with which to pay for said shares; that the aforesaid arrangement was concealed from The Columbia Trust Company as such executor, it being led to believe by the individual defendants and said Brigham as aforesaid that the defendant, The Woolson Spice Company, was without excess assets and had a restricted and weak credit and that its prospective earning capacity was rapidly declining; that because of such concealments and misrepresentations The Columbia Trust Company, as such Executor, was induced to make said sale as hereinabove set forth; that shortly [fol. 127] after the sale of said shares as aforesaid and prior to the payment of the purchase price thereof, the defendant, The Woolson Spice Company, procured and distributed and/or advanced to the individual defendants and to said Brigham a sum or sums of money sufficient to pay the purchase price of said shares as theretofore arranged as aforesaid between the defendant, The Wool-

son Spice Company, and said individual defendants and said Brigham with the help and assistance of sundry other persons.

30. That since said issue and delivery of said certificates to said individual defendants and said Brigham and/or their nominees, the defendant The Woolson Spice Company has paid sundry dividends to said individual defendants, said Brigham, their nominees and transferees in stock and money, no part of which has been paid to the Executor of the estate of Hermann Sielcken or to any beneficiary of that estate; and that the plaintiff, as the residuary legatee and beneficiary of said estate, has been thereby deprived by the said fraud and wrongdoing of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, of the said 824 shares of stock and of the dividends declared and paid thereon, or of a large sum of money representing the fair market value of said stock and the amount or value of said dividends with interest from the date of payment.

31. That the said fraud and unlawful acts of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, hereinbefore more particularly set forth were not discovered by the plaintiff until about March, 1931, and, on information and belief, were not discovered by the defendant, Irving Trust Company, until on or about said date.

32. Plaintiff is ready, able and willing to pay to the defendants or any one of them, such sum or sums of money, if any, as this Court may determine is due and owing to [fol. 128] any or all of the individual defendants or to the defendant administrators of the estate of said Brigham, by reason of the payment by them and said Brigham of the aforementioned sums as purchasers of said shares, or plaintiff is ready and willing to have this Court set off against any sum which it may determine to be due and owing to plaintiff or to the Irving Trust Company, as such Executor, by any of the defendants any sum which the said defendants or said Brigham may have paid as purchasers of said stock.

33. That the plaintiff is without adequate remedy at law.

Wherefore the plaintiff prays:

1. That the defendant, The Woolson Spice Company, be required to account to the plaintiff for the said 824 shares of its common capital stock or such shares as the said 824 shares of stock may represent in any recapitalization of said Company which may have occurred since the sale of said 824 shares and register the plaintiff, upon its books as the owner of said stock, and issue to her certificates for said shares of stock.

2. That in the event that The Woolson Spice Company does not have in its treasury or under its control sufficient shares of stock to enable it to issue to the plaintiff certificates for said shares of stock, that the Court require the defendant, The Woolson Spice Company, the individual defendants herein and said defendant administrators, Ammi F. Mitchell and Leroy E. Eastman to pay to said plaintiff the reasonable value of said shares of stock or the reasonable value of such shares of stock as may be represented by said 824 shares in any recapitalization of said corporation.

3. That the defendant, The Woolson Spice Company, the individual defendants and said defendant administrators be required by the decree of this court to account to the plaintiff for all dividends which have accumulated and/or been paid upon said 824 shares of stock since July 25, 1918, [fol. 129] or upon any stock represented by said 824 shares of stock in any recapitalization of said corporation, together with interest upon said dividends from the date of payment thereof.

4. That the individual defendants, said defendant administrators and each of them be required by order of this Court to produce and surrender for cancellation any certificates issued in their names or in the name of William G. Brigham for any of said 824 shares of stock or for any shares of stock represented by said 824 shares in said recapitalization of said corporation.

5. That the individual defendants, said defendant administrators and the defendant, The Woolson Spice Company, be enjoined, except under order of this Court first having been obtained, from transferring any of its shares of stock or from issuing certificates for further shares of

stock and from changing in any way its present capital structure.

6. That the plaintiff have such other and further relief in the premises as the Court may deem meet and just.

(Signed) Baker, Hostetler, Sidlo & Patterson,
(Signed) Fraser, Hiett, Wall & Effler, Attorneys for the Plaintiff.

Duly sworn to by Clara Sielcken-Schwarz. Jurat omitted in printing.

[fol. 130] In Court of Appeals of Lucas County, Ohio

Ex Parte Robert A. Stranahan

Writ of Habeas Corpus—Filed June 15, 1932

State of Ohio,
Lucas County, ss:

To Joseph Zimmerman, Sheriff of Lucas County, Ohio:

We command you that the body of Robert A. Stranahan, in your custody detained and restrained of his liberty, as it is said, you take and have before the Court of Appeals of Lucas County, Ohio, or before one of the judges of said court, at the courtroom of said court in the courthouse of said county, on the 15th day of June, 1932, at 9:30 A. M. o'clock, to do and receive what said court or said judge shall then and there consider, concerning him in that behalf; and have you then and there this writ.

In witness whereof, I, George E. Hardy, Clerk of said Court of Appeals, have hereunto set my hand and affixed the seal of said court this 14th day of June, 1932.

(Signed) Geo. E. Hardy, Clerk, by (Signed) M. E. Theuerkauff, Deputy Clerk. (Seal.)

Sheriff's Return

Received this writ June 14th, 1932, at 10:45 A. M., and pursuant to its command I do now have, this 15th day of June, 1932, at 9:30 A. M., the body of Robert A. Stranahan before the Court of Appeals of Lucas County, Ohio.

I certify that the cause and reason for my having the said John W. Koehrman in custody arises from and is because of a writ and commitment papers issued and delivered to me by William Purcell, Notary Public, Lucas County, Ohio, which said writ and commitment papers I hereto attach and make a part hereof as completely as though fully rewritten herein.

Joseph Zimmerman, Sheriff, by (Signed) Rolland Staggemeier, Deputy.

Costs $.91.

[fol. 131] For the "writ and commitment papers" attached to the foregoing Sheriff's Return, see the order of attachment of appellant, Robert A. Stranahan, which appears in full as an Exhibit to the pleading entitled "Petition for Writ of Habeas Corpus", at pages 102 to 103, supra, of this Transcript; and the subpœna upon this appellant, which appears in full as an Exhibit to the same pleading, at page 104, supra of this Transcript; both of which exhibits are here incorporated by reference thereto as fully as though repeated verbatim.

The Sheriff's Return of service of said order of attachment, endorsed thereon, is as follows:

Sheriff's Return

Received this writ June 13th, 1932, 11:25 A. M. and pursuant to its command I did attach the body of Robert A. Stranahan, June 14, 1932, and had him before William Purcell, Notary Public, Lucas County, Ohio, in the Court Room of the Court of Appeals, Lucas County, Ohio.

Joseph Zimmerman, Sheriff. Rolland Staggemeier, Deputy.

Costs $.91.

The Notary Public's return of service of said subpœna, endorsed thereon, is as follows:

State of Ohio,
Lucas County, ss:

William Purcell, being first duly sworn, says that on Tuesday, June 7th, 1932, at about three o'clock, P. M., he

served a copy of the within subpœna upon Robert A. Stranahan, personally, at the office of the Champion Spark Plug Company, Toledo, Ohio.

William Purcell.

Sworn to before me and subscribed in my presence [fol. 132] this 8th day of June, 1932. Fred M. Kramp, Notary Public, Lucas County, Ohio.

(Rubber stamp:) (Fred M. Kramp, Notary Public, Lucas County, Ohio.)

[fol. 133] IN COURT OF APPEALS OF LUCAS COUNTY, OHIO

C. A. No. 2693

EX PARTE ROBERT A. STRANAHAN

RECOGNIZANCE—Filed June 17, 1932

THE STATE OF OHIO,
Lucas County, ss:

Be it remembered, that on June 14th, 1932, Robert A. Stranahan personally appeared before this court, and acknowledged himself to owe the State of Ohio the sum of One Hundred Dollars ($100.00), to be levied of his goods and chattels, lands and tenements, if default be made in the condition following, to wit:

The condition of this recognizance is such that if the above bound Robert A. Stranahan be and appear before this Court of Appeals, on the fifteenth day of June, 1932, and abide the judgment of this court, and not depart without leave, then this recognizance shall be void; otherwise it shall be and remain in full force and virtue in law.

(Signed) Robert A. Stranahan.

Taken and acknowledged before me, on the day and year above written. George E. Hardy, Clerk of the Court of Appeals.

[fol. 134] In Court of Appeals of Lucas County, Ohio

No. 2693

Ex Parte Robert A. Stranahan

Motion for New Trial—Filed June 22, 1932

Now comes the petitioner, Robert A. Stranahan, and moves the Court to vacate and set aside the findings and judgment of the Court herein and grant a new trial of this case, for the following reasons materially affecting the substantial rights of such petitioner:

(1) The Court erred in not finding and adjudging that petitioner was unlawfully deprived of his liberty, and in not discharging him.

(2) The Court erred in re-committing and remanding petitioner to the custody of the respondent.

(3) The finding, decision and judgment of the Court are contrary to law.

(4) The finding, decision and judgment of the Court are not sustained by sufficient evidence.

(5) The finding, decision and judgment of the Court are erroneous, in that there is no evidence to sustain them.

(6) The Court erred in not finding and adjudging that the order of attachment under which petitioner was imprisoned by the respondent was void and of no effect.

(7) The Court erred in not finding and adjudging that the petition of the plaintiff in the case in which it was attempted to take said depositions, viz: Case No. 131,925 in the Common Pleas Court of Lucas County, Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants, stated no cause of action whatever and tendered no issue whatever and that no testimony which petitioner could give would be relevant or material to any issue whatever under said alleged petition or in said alleged action and that therefore the action of the notary public in attempting to adjudge that petitioner was in contempt and in issuing an attachment for petitioner and bringing about his arrest and detention violated the

provisions of Section 1 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States and were illegal, null and void.

[fol. 135] (8) The Court erred in not finding and adjudging that the petition of the plaintiff in said Case No. 131,925 in the Court of Common Pleas of Lucas County, Ohio, in which it was attempted to take said depositions, affirmatively showed that said plaintiff had no capacity or right whatever to bring or prosecute said action or to take any depositions at all therein or to enforce the attendance or testimony of any witnesses and that therefore the action of the notary public in attempting to adjudge that petitioner was in contempt and in issuing any attachment for petitioner and bringing about his arrest and detention violated the provisions of Section 1 of Article I of the Ohio Constitution and the provisions of the Fourteenth Amendment to the Constitution of the United States and were illegal, null and void.

(9) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article I of the Constitution of the State of Ohio and are null and void, in that they deprive the petitioner of his liberty and property, contravening that part of Section 1 of Article I, which provides that all men "have certain inalienable rights, among which are those of enjoying and defending liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety".

(10) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 14 of Article I of the Constitution of Ohio, and are null and void, in that they deprive the petitioner of security in his person, papers and possessions, and subject him to unreasonable search and seizure, contravening that part of Section 14 of Article I, which provides that the "right of

the people to be secure in their persons, houses, papers and possessions against unreasonable searches and seizures shall not be violated".

(11) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Sections 5, 10 and 16 of Article I and Section 32 of Article II of the Constitution of Ohio, and are null and void.

(12) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of said sections as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of Article IV of the Constitution of Ohio in that they attempt to confer judicial power on notaries.

[fol. 136] (13) The Court erred in not finding and adjudging that Sections 11510, 11511 and 11512 of the General Code of Ohio and each of them, and the operation of such sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment of the Constitution of the United States of America, and are null and void, in that they deprive the petitioner of his liberty and property without due process of law; contravening that part of Section 1 of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law".

(14) The Court erred in not finding and adjudging that said notary public had no jurisdiction to attempt to take said depositions or to force or require petitioner to attend as a witness or to adjudge petitioner in contempt for failing or refusing so to do, or to make or issue any order of attachment against this petitioner.

(15) The Court erred in not finding and adjudging that said notary public, in attempting to adjudge petitioner in contempt and in issuing an attachment for him, attempted to exercise judicial powers in violation of Section 1 of Article IV of the Constitution of Ohio, and that all of said acts of said notary were null and void.

(16) The Court erred in not finding and adjudging that the notary public purporting to act under said Sections 11510, 11511 and 11512 of the General Code of Ohio and attempting to adjudge the petitioner guilty of contempt and issuing said order of attachment for his person, was disqualified on account of his personal pecuniary interest in the taking of said depositions so to adjudge and act and to cause any attachment to be issued against petitioner by reason of the fact that said notary public was employed and paid by the plaintiff in said alleged pending suit, the notary's judgment of contempt and attachment being made and issued at the request of said plaintiff and that his employment was upon such terms that its extent and continuance and his continued compensation was contingent upon procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and attachment and that therefore said notary's acts in so adjudging and bringing about petitioner's attachment and detention were a denial of due process of law in violation of the Fourteenth Amendment to the Constitution of the United States of America and a denial of the right of redress in courts and of a remedy by due course of law in violation of Section 16 of Article I of the Constitution of the State of Ohio and were null and void.

(17) The Court erred in not finding and adjudging that the attempted adjudication by the notary that the petitioner was in contempt and the issuance of an attachment against him in petitioner's absence and without notice to him or to his counsel and without an opportunity for him first to know the charges against him or to have a hearing thereon were in violation of petitioner's constitutional rights under Sections 1, 5, 10, 14 and 16 of Article I and Section 1 of Article IV of the Ohio Constitution and each of such sections and in violation of his rights under the Fourteenth Amendment of the Constitution of the United States and were null and void.

[fol. 137] (18) The Court erred in not finding and adjudging that the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County Ohio, in which it was attempted to take said depositions was not entitled to take depositions nor did the notary public have power or jurisdiction to issue any subpœna requiring the attendance of

any witness or issue any attachment for any witness for the reason that no service of summons had been made on one of the defendants in said action, viz: Marion M. Miller, nor had any service been made on the defendant Irving Trust Company in its capacity as Executor of the Estate of Hermann Sielcken, deceased.

(19) The Court erred in not finding and adjudging that the attempt of the plaintiff in said Case No. 131,925 in the Common Pleas Court of Lucas County Ohio, entitled Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants, to take depositions in said case was not in good faith for the purpose of securing or perpetuating any evidence material to any issue of said case or for use in the trial of said case or that it was not otherwise in good faith, but was an abuse of process.

(20) The Court erred in other respects apparent on the face of the record.

Tracy, Chapman & Welles, Marshall, Melhorn, Marlar & Martin, Attorneys for Petitioner.

[fol. 138] [File endorsement omitted]

In Court of Appeals of Lucas County

Petitioner's Bill of Exceptions

Filed June 23, 1932.
Notified, Waived.
Delivered to Hon. Harry W. Lloyd, ss.
Richards, Roy H. Williams, June 23-32.
Received from Hon. Harry W. Lloyd, ss.
Richards, Roy H. Williams, June 23-32.

[fol. 139] [Title omitted]

Appearances:

Messrs. Tracy, Chapman & Welles, by Messrs. George D. Welles and Harry S. Bugbee; Messrs. Marshall, Melhorn, Marlar & Martin, by Mr. Stuart S. Wall, for the Petitioner.
Messrs. Fraser, Hiett, Wall & Effler, by Mr. Harold W.

Fraser; Messrs. Baker, Hostetler, Sidlow & Patterson, by Mr. R. T. Jackson, for the Respondent.

Be it remembered that on the trial of the above entitled action and proceedings in the Court of Appeals, Lucas County, Ohio, in the May Term of said Court, A. D. 1932, said trial beginning on the 15th day of June, A. D. 1932, before the Honorables Harry W. Lloyd, Silas S. Richards and Roy H. Williams, Judges of the said Court, the following proceedings were had, viz:

COLLOQUY

Mr. Welles: Mr. Stranahan, one of the petitioners was here and by consent of counsel he has been permitted to go subject to return on call. Before proceeding with this case we would like, if Your Honor please, to have leave to file in each of the three pending cases of Ex Parte Koehrman, Ex Parte Bevan and Ex Parte Stranahan leave to file amendments to the petition for writs of habeas corpus. We have given counsel on the other side copies of the proposed amendment.

Judge Lloyd: They may be filed.

Objection; exception.

Mr. Welles: We should direct the court's attention to the fact that there is, as we are informed, no return or answer from the sheriff at this time. We assume that before we proceed there should be.

Mr. Fraser: If your Honors please, the sheriff is here with the bodies of these men and with his return and I [fol. 140] understand the practice is to hand you the return when he hands you the bodies.

Mr. Welles: I may be in error, but I understand that the return constituted an answer which raised such issues, if any, of fact as the sheriff thought proper to raise and that the question of the propriety of the custody really is dependent upon the return made by the sheriff, showing whether or not he does have legal custody.

Judge Lloyd: Have you the returns here? Let's see them.

Deputy Sheriff Staggemeier: Here they are (handing returns to the court).

Mr. Fraser: The return in each case is accompanied by the original papers under which the sheriff is holding these

men, as an exhibition to the court as to why he is holding them.

Judge Lloyd: I suppose we can go on with the hearing now.

Mr. Welles: May we see what the return says?

Judge Lloyd: Each is like the other. Here they are.

Mr. Welles: If your Honors please, in order to save time and get forward with this thing, we would like, with the court's permission, to save our objection to the return on the ground that it does not show any legal cause for the arrest or detention of any of the petitioners and without waiving that point we will proceed with the evidence, first making a statement. These three petitions for writs of habeas corpus arise by reason of writs issued by William Purcell, a notary public, in a case pending in the Court of Common Pleas of this county in which one Clara Sielcken Schwarz is the plaintiff and The Woolson Spice Company, John W. Koehrman, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan, Robert A. Stranahan, Ammi F. Mitchell and Leroy E. Eastman, as administrators of the estate of William A. Brigham, deceased, and The Irving Trust Company, a foreign trust company, as executor of the estate of Herman Sielcken, deceased, are named as defendants. The petitioner Bevan was served with a subpœna duces tecum, which is attached to his petition and he appeared before the notary and answered certain questions and then, upon the advice of his counsel, declined to answer [fol. 141] certain questions. Counsel for the defendants appeared at that occasion for the sole purpose, as shown by the record, of protesting and objecting to the taking of depositions on various grounds which I will come to in a moment. Petitioners Robert A. Stranahan and Frank D. Stranahan, were served with writs of attachment. I should say the petitioners Robert A. Stranahan and John W. Koehrman were served with writs of attachment, requiring them to appear before the same notary public to give testimony and directing the sheriff to produce them for that purpose there. The petition in the case of Clara Sielcken Schwarz v. The Woolson Spice Company, et al., is one in which the plaintiff alleges that she is residuary legatee of Herman Sielcken, deceased, and that The Irving Trust Company, a New York corporation, is the executor, still undischarged and acting under the will of Herman Sielcken, deceased. The petition attempts to charge a conspiracy alleged to

have been devised and carried out in the years 1917 and 1918 by the defendants Koehrman, Biggs, Miller, the two Stranahans, and W. A. Brigham, deceased, represented by Mitchell and Eastman as administrators. It is also charged that The Woolson Spice Company was a co-conspirator with the individual defendants. The petition attempts to charge that a sale of stock of The Woolson Spice Company by The Irving Trust Company as executor to the individual defendants, or some of them, was brought about by fraudulent representations or misrepresentations. The plaintiff seeks to have the sale of the stock in the amount of 824 shares of the old stock of The Woolson Spice Company set aside. She requests that the existing stock of The Woolson Spice Company issued in lieu of that should be transferred to her, that the corporation should be required to do so and that she may have an accounting and that she may receive all dividends, disbursements of every kind, which have been made by The Woolson Spice Company to the owners of this stock from the year 1918 down to the present time. The petition is very lengthy, it contains some twenty-eight pages, but the main point claimed and the main relief asked is as I have stated. The plaintiff seeks to excuse the long delay in the presentation of this claim and in the attempt to enforce it [fol. 142] by an allegation to this effect, it is paragraph 31 of the petition:

"That he said fraud and unlawful acts of the individual defendants, said Brigham and the defendant, The Woolson Spice Company, hereinbefore more particularly set forth were not discovered by the plaintiff until about March, 1931, and, on information and belief, were not discovered by the defendant, Irving Trust Company, until on or about said date."

That is all that there is in the way of explanation or attempted explanation as to why this matter has been permitted to rest since 1918. As I have said, the theory of this petition is that there was a fraud, an actual fraud, committed by the defendants so attempted to be charged. But as your Honors will see when you come to examine the petition in the main case, nearly every allegation attempting to make any charge of wrongdoing I think, all except one, is made upon information and belief. The Irving Trust Company, it is alleged, upon demand having been made upon it to bring this suit as executor, declined

to do so and the attempt is therefore made to make it a party defendant as executor. We expect the evidence here will show that the Irving Trust Company as executor is not in this case in any way. The Irving Trust Company itself has been permitted to do business here but the Irving Trust Company as executor of the estate of Herman Sielcken is not in this state or admitted to do business here. A demurrer has been filed in the Court of Common Pleas to this petition by one of the defendants, namely Franklin H. Biggs, the grounds of the demurrer are: first, that the plaintiff has not legal capacity to sue, and second, that the petition does not state facts which show a cause of action.

Judge Lloyd: When was that filed, how long ago was that?

Mr. Welles: It was filed on June 11, 1932.

Judge Lloyd: I was wondering why it had not been heard.

Mr. Welles: I may say if it is important, the evidence here will be to the effect that we offered to have it heard immediately, prior to the going forward of these depositions or the attempt to go forward with them, and that counsel representing the plaintiff said they preferred to have that demurrer [fol. 143] heard in the usual and ordinary course. We filed a brief with the court with the number of points raised in the demurrer, and filed a copy of that with counsel for plaintiff. Then, third, that there is a misjoinder of parties defendant; fourth, that there is a defect of parties plaintiff; four-a, that there is a defect of parties defendant; fifth, that separate causes of action against several defendants are improperly joined; sixth, that the action was not brought within the time limit for the commencement of such an action, and seventh, that several causes of action are improperly joined. I may say we have been and are now ready to submit that demurrer to the Court of Common Pleas at any time, and have so advised counsel for plaintiff in the court below.

Judge Lloyd: Did counsel request oral argument? Unless the rule is changed, as soon as the demurrer is filed and briefs with it, the court goes ahead and decides it on its own initiative.

Mr. Welles: There has been no brief filed on behalf of plaintiff and their time has not expired, but in the meantime, as the evidence will show, an attempt was made to go forward with these depositions. Now, in addition to the fact that, if we are correct in our position on the demurrer,

the plaintiff has no legal capacity to sue and that there is no cause of action stated and that therefore there can be no material or relevant evidence of any sort obtained from any witness, therefore no witness can be required to answer any question. It further appears *that*, or will appear, that the notary public issued for the petitioner Bevan, who is the secretary and treasurer of The Woolson Spice Company, a subpœna duces tecum of a character which, under the authorities as we understand, constitutes an unreasonable search and seizure and which does not comply with the rule that requires reasonable description and specification of papers which it is sought to have produced by such subpœna. An example of the requirements of the subpœna is "all contracts and copies of contracts at any time entered into by you", this is in the Koehrman subpœna, "at any [fol. 144] time entered into by you for the purchase or sale of any corporate stock of The Woolson Spice Company"; and skipping through, for instance, No. 5 "All correspondence and copies of correspondence had by you with The Columbia Trust Company, New York, and/or its successors and/or any of its officers, agents and directors, including George E. Warren and Willard V. King, from 1916 to 1932 inclusive". Regardless of the subject matter of the correspondence it is all required to be produced. And another one, No. 8, "Any and all correspondence and copies of correspondence with William A. Brigham, Franklin H. Biggs, Marion M. Miller, Frank D. Stranahan, Robert A. Stranahan, Thorlief Nielsen, John S. Sorenson, The Woolson Spice Company and S. P. Jermain, from 1916 to 1932 inclusive," regardless of the subject matter of such correspondence, so that it seemed to us and we so advised Messrs. Koehrman and Bevan, Mr. Bevan's subpœna duces tecum was of a similar character, that under the law and the Constitution that they were not required to undertake to move their files bodily up to the law office of Messrs. Fraser, Hiett & Effler, and that the subpœna so far as it attempted to require the production of the papers was, in our opinion, void and until this court or some other court would otherwise rule they need not obey it. Now, as I say, the evidence will show that we appeared specially at the taking of the depositions of Mr. Bevan and saved all of our objections to the procedure, but he nevertheless did answer some questions. Certain questions he was advised he need

not answer on the grounds which I have stated here, that the petition does not state a cause of action and plaintiff had no legal capacity to sue and the other grounds stated in the demurrer, that the subpœna duces tecum was illegal and void, and, accepting that advice, he declined to answer certain questions which, even if the petition did state a cause of action, I think under the rule laid down by this court in Poe v. Mathias, would be found to be wholly immaterial, and thereupon this order of commitment was issued. We think the evidence will show that the notary issued this order of commitment in the absence of the witness Bevan, in the absence of his counsel, without notice [fol. 145] to counsel or to Bevan, without opportunity to Bevan to be heard on the question as to whether he had committed a contempt or whether he was justified in refusing to answer the questions and produce the books and the notary purported to adjudge, using that word, that Bevan was in contempt and purported to adjudge that the questions asked him were material, as shown by the commitment papers signed by the notary himself. It will, as your Honors have seen at this time be our contention that there has been a violation of the constitutional rights of these plaintiffs both under the state statutes, numerous sections of which we will point out in our argument, under the fourteenth section of the Constitution of the United States, an attempt on the part of the notary to exercise judicial power, and the evidence will show that the notary has necessarily a pecuniary interest in attempting to force these witnesses to testify before him, since he is acting not only as notary but as stenographer and will get certain fees and compensation for writing the transcripts, and therefore he is disqualified from undertaking to decide whether this man should be put in jail, under a decision of the United States Supreme Court in the Toomey case and other similar cases. Mr. Wall has reminded me that the evidence will also show that there has been no service of summons upon Marion M. Miller, one of the defendants, and that the attempted service of summons upon the Irving Trust Company as executor is void and ineffective as service against it as executor; that there has been no service of notice of the taking of these depositions upon the defendant Marion M. Miller and no real legal service of notice of the taking upon

the Irving Trust Company as executor, and that, therefore, the case has not been placed in the posture required by the statutes for the taking of depositions, even though there were nothing else involved. I perhaps did indicate, but to make it clear, the opening statement is intended to apply to all three of the pending habeas corpus proceedings, Bevan, Stranahan and Koehrman, except in so far——

Judge Lloyd: I take it the questions involved are practically the same?

[fol. 146] Mr. Welles: Practically the same. There are one or two questions in the Bevan case arising by reason of the fact that some questions were asked him that do not arise in the Stranahan or Koehrman cases; otherwise the question is the same.

Mr. Fraser: Upon the last questions, if the court please, your Honors may want to consider this question, whether or not a witness who defies an order of a notary to appear and refuses to appear, and in answer to a subpœna appeared and refused to testify, anyway, whether that witness is in a position to raise these questions which Mr. Welles suggests. The only witness appearing was Mr. Bevan. Your Honors have observed from the statement of counsel this is a case involving a charge of an unlawful conspiracy entered into, secretly of course, by the defendants for the purpose of defrauding this estate. The petition is long in an attempt to set up the facts and after the statement of legal questions the facts are there and properly there under the authorities, we believe. We believe this plaintiff has a complete right and complete legal capacity to file and maintain this suit. How far your Honors will feel justified, in view of the decisions of this court, in examining into the technical sufficiency of this petition which is pending in the Court of Common Pleas and in which your Honors have no original jurisdiction to examine, will be discussed later as I have suggested. So far as the facts are concerned, on the sixth day of June a proper legal notice was served of the taking of depositions upon the thirteenth, was served upon counsel for these defendants who are now trying or appearing and who acknowledged service of that notice, and who appeared on the thirteenth with a witness Bevan. They were served with summons originally in the case on the second of June. Because of the fact that certain allegations in this petition

for habeas corpus, the court should be advised that upon the original notice served and original subpœnas the defendants, in order to frustrate us in the taking of depositions, applied to the Common Pleas Court for an injunction, their main contention being, as I understand, they wanted time to prepare the case, on the sixth of June. On [fol. 147] the sixth of June an agreement was made, a verbal agreement, that the depositions would be taken on the thirteenth. Thereupon new notices were served on Monday, the sixth, acknowledged and on the seventh, after service of those notices, the subpœnas were served on the defendants.

Judge Lloyd: Is this suit an action for damages or a suit in equity?

Mr. Fraser: Suit in equity, I rather think it is. It is a suit with alternative relief prayed for.

Judge Lloyd: If it is a suit in equity you could have a bill of discovery.

Mr. Fraser: That is doubtful under the Fairchild case. That case deals with the other question we have here, matter of materiality and matter of properly questioning—at any rate we have a legal right under the law, statutory right to take these depositions, and we think these gentlemen have no power to nullify that right. We think the court will be satisfied that these questions put to Mr. Bevan were material on the issues as presented in the petition. The subpœna duces tecum, to illustrate, we tried through Mr. Bevan, secretary and treasurer of the company, to produce the minute book. If that is not a correct description of the book, I don't know what is. He went on the stand and testified that he did have it but had turned it over to his counsel. Where it was now he didn't know. When he was on the stand we discovered that. Whether we will ever get the book, we don't know. We asked for the record of stock transfers, which are most material to this situation. This whole deal, as all these deals are, was concocted and carried out in the dark, with the lights all out, as these gentlemen always work, and work in secret. We wanted to find out what the minutes of this company showed, so I asked, we asked for the production of the minute book and it appears in the testimony of Bevan that there is one, but where it is we do not know, it was in his possession until the filing of this suit and he says it was turned over to his

counsel. We asked for the production of the record of the [fol. 148] payment of dividends since this time when we say this stock was fraudulently acquired and transferred. We asked for the record of the company showing the transfers of stock. It is obvious that this deal or transfer had been indirect and through many hands. That is the way those things are usually done, and we are entitled to know how. This man has testified that there are such records. In the subpœna duces tecum we only have to describe the document so the witness may know what is wanted and what is meant. If there is anything in the subpœna he doesn't know and can't ascertain the identity of, that can be taken care of when it is reached. In this examination of Mr. Bevan we tried to have him produce these things designated, which are perfectly plain. No one can doubt their identity. He refused to produce them under the advice of counsel. We believe, if the court please, under the authorities this is the rule which your Honors will apply, that if there is any reasonable probability or possibility, as some of the courts say, these matters being material in this case, the court will not deny us the right to ascertain those facts, even though it does involve the cross examination of a defendant. The statute was passed for that purpose and as the Supreme Court has said in many cases, particularly in the Fairchild case, we can not be required to wait until they are satisfied the time has arrived for our finding out these facts. It is a valuable right given by the statute and we insist now it is two weeks after the filing of the petition. They have secured that much delay and we are entitled to proceed in the examination of these people and ascertain the facts and ascertain other evidence. Now, there is an allegation here for example, made in the supplement, that Mr. Purcell is not disinterested. No answer, I think is filed, and I understand it is not necessary to file an answer. That allegation of course we challenge. They make a challenge that our effort wasn't in good faith, to take testimony. That allegation is challenged, and proof will be offered. But if your Honors' practice is to exclude evidence challenging and disproving allegations of that kind, somebody must have the right to file an answer. The suit as filed here is not plaintiff and defendant, as may be done, it is filed ex parte John Smith, ex parte Koehrman, and the sheriff produces the body and the return and shows

why he is holding these men. Whether the sheriff has any [fol. 149] right—he denies this charge of bad faith, he denies the officer was not authorized.

Mr. Welles: It is agreed in the Stranahan case that Mr. Robert A. Stranahan, the petitioner, would, if called as a witness, testify that he is in good health and that he expects to be present at the trial of this case if and when the case is tried on the merits.

Mr. Fraser: We make that stipulation notwithstanding the fact that on Monday Mr. Welles said Mr. Stranahan was ill and not feeling well.

Mr. Welles: As far as I know, that is the only thing we have been able to agree upon since this trial started.

Mr. Fraser: We can agree upon this, if the court please, that no service of summons has been made on Marion Miller. He is in California, and service here was residence service only and whether it was made, I don't know.

Judge Richards: Is he a necessary party?

Mr. Fraser: No.

Judge Richards: Is the Irving Trust Company?

A. No, I think not. But they have been served. Not only that, but have entered their appearance by acknowledgment of the deposition notice.

Mr. Wall: The sheriff's return on Miller shows "not found".

Mr. Fraser: Very well.

Mr. Welles: I understand you agree there has been no service on Marion Miller, either by summons or notice to take depositions?

Mr. Fraser: Yes, sir. And depositions when taken, we concede can not be used against the man who didn't have notice, but may be used against those served. These stipulations are made reserving our objections and exceptions to their materiality.

Offers in Evidence

Mr. Welles: Any offer of evidence as made by us is subject to our objection that there is not sufficient showing by answer or return from the sheriff showing legal custody of any of the petitioners. We do offer in evidence the petition in the case of Clara Sielcken Schwarz v. The Woolson

Spice Company, and in order to avoid encumbering the record further, if it is satisfactory, the copy attached to [fol. 150] the amendments to the habeas corpus proceedings may be considered in evidence.

Mr. Fraser: It is also attached to the return of the sheriff. We do not object on the ground of identification.

Judge Lloyd: You may have your exceptions.

Mr. Welles: Without objection as to lack of certification?

Mr. Fraser: Yes.

Mr. Welles: We offer copy of the demurrer filed by defendant Franklin H. Biggs in the case of Schwarz v. Woolson Spice Co.

Mr. Fraser: Note an objection on the ground of materiality.

Mr. Welles: And marked Plaintiff's Exhibit No. 2, the petition should be marked Exhibit No. 1. In the Bevan case we offer in evidence the copy of the commitment which is attached to the petition, and which may be marked Exhibit No. 3A. We also offer the copies of the writs of attachment which are respectively attached to the petitions in the Stranahan case and in the Koehrman case, and which are marked Exhibit 3B and 3C respectively.

Mr. Fraser: The originals of those are likewise attached as a part of the sheriff's return of the writ of habeas corpus. Are those marked?

Mr. Welles: Those should be numbered in their own cases. We offer in evidence in each of the three cases Exhibit No. 3, which is a copy of the authority of the Irving Trust Company of New York to do business in the State of Ohio. If it is agreeable to counsel we will use a certified copy of it in one case and copies of that in the others.

Mr. Fraser: We are objecting to Exhibit No. 3 on the ground that The Irving Trust Company has already entered its appearance here.

(Overruled; exception.)

Mr. Welles: We also offer in evidence in each of the three cases Exhibit No. 4, which is a certified copy of the instrument filed by The Irving Trust Company with the secretary of state showing its authorized powers and the location of its office in this state and the name of its local representative, etc. We shall offer a certified copy in one case and copies of that in the others, if there is no objection.

[fol. 151] Mr. Fraser: Note our objection and exception.

Mr. Welles: We now offer in evidence in the Bevan case the subpoena duces tecum which was served on Mr. Bevan, marked "Plaintiff's Exhibit No. 7", in the Koehrman case the subpoena marked "Plaintiff's Exhibit No. 8", and in the Stranahan case the subpoena which was served on Mr. Stranahan, marked "Plaintiff's Exhibit No. 9", copies of each being attached to the original petitions for habeas corpus.

Mr. Fraser: Referring to the subpoenas served on the seventh of June?

Mr. Welles: Yes, the ones attached to the petition. No objection to the use of copies, is there?

Mr. Fraser: Not at all.

Mr. Welles: I would like to call Mr. Purcell the notary public.

Thereupon, WILLIAM PURCELL, being first duly sworn, testified as follows:

Direct examination.

By Mr. Welles:

Q. Your name is William Purcell?

A. Yes, sir.

Q. Live in Lucas county, Ohio?

A. Yes, sir.

Q. Notary Public of that county?

A. Yes, sir.

Q. You are the William Purcell who issued the writ of commitment for C. N. Bevan and writs of attachment for Robert Stranahan and Koehrman?

A. I am.

Q. In the case of Schwarz v. Woolson Spice Company?

A. Yes, sir.

Q. Were you employed by somebody to act as notary and take or attempt to take depositions?

A. Yes, sir.

Q. Who employed you?

A. The firm of Fraser, Hiett, Wall and Effler directly.

Q. The same firm who are of counsel for Clara Sielcken Schwarz in the case mentioned?

A. Yes, sir.

[fol. 152] Q. Is it a fact that you originally signed subpœnas for Mr. John W. Koehrman and Mr. C. N. Bevan and Mr. Stranahan, directing them to appear before you to give testimony and produce books and papers, at a time when no petition in the case of Clara Schwarz v. Spice Company had been filed?

(Objection.)

Mr. Frazer: The notice which they acknowledged was upon the sixth of June, there was an earlier notice served on the day the case was filed, which was questioned before Judge Gosline on the sixth of June and at that time new notices were drawn and served.

Mr. Welles: I thought in view of some of the things Mr. Fraser had said about the history in the Court of Common Pleas——

Judge Lloyd: I don't think we are getting on——

Mr. Welles: Very well. Did you receive from anybody any acknowledgment or proof of service of notice of the taking of depositions before you set for June 13, 1932, in the cause of Schwarz v. Woolson Spice Company?

A. Yes sir.

Q. Do you have that with you?

A. No, sir.

Q. Do you have it there, Mr. Fraser?

Mr. Fraser: Yes.

Mr. Welles: May I see it. Now, Mr. Purcell, I show you a paper marked Plaintiff's Exhibit No. 6, is that the acknowledgment of service of notice of the taking of depositions just referred to by you?

A. Yes, sir.

Q. Have you any other acknowledgment of service of notice than that, referring to the June 13th proceedings?

A. No, sir.

Q. You have no return of service of notice of the taking of these depositions upon Irving Trust Company, executor?

A. None other except just this.

Q. Or upon Marion M. Miller?

A. No, sir.

Q. Neither one?

A. No sir.

Q. Have you any acknowledgment or proof of return or service of this notice or any notice upon Mitchell and Eastman?

(No answer.)

[fol. 153] Q. Mr. Purcell, I show you a copy of the subpœna duces tecum, which is attached to the original petition for writ of habeas corpus filed by C. N. Bevan, is that a copy of the subpœna duces tecum issued by you for Mr. Bevan?

A. I can't tell, Mr. Welles.

Q. Have you produced the original Bevan subpœna signed by you?

A. It wasn't given to me, sir. It was introduced in evidence. It was referred to but not marked as an exhibit at the taking of the deposition.

Q. Was it left in your possession?

A. No, sir.

Q. I show you paper marked Exhibit No. 7, is that the original subpœna signed by you for Mr. Bevan?

A. Yes, sir.

Q. Dated the seventh of June?

A. Yes, sir.

Q. Did you prepare that subpœna, or did counsel for plaintiff prepare it?

A. Counsel prepared it.

Q. Counsel prepared it for you?

A. Yes, sir.

Q. I show you the commitment addressed to Joseph Zimmerman, sheriff, directing him to arrest and commit C. N. Bevan to the jail of Lucas county, being a paper which is attached to the sheriff's return in the Bevan case, did you sign that commitment?

A. Yes, sir.

Q. Did you give Mr. Bevan any notice before you signed it that you were going to sign it?

(Objection; overruled; exception.)

A. No, sir.

Q. Did you give counsel for Mr. Bevan any notice that you were to sign a commitment for Mr. Bevan?

(Objection; overruled; exception.)

A. Yes, sir.

Q. Isn't what you said this: that if a commitment was presented to you, you would sign it?

A. No, Mr. Welles, I believe I said that I was going to sign one but I didn't think I would get it into the hands of the sheriff before morning.

Q. You gave counsel for plaintiff no notice of the time and place when you were to sign the commitment?

A. Counsel for plaintiff?

[fol. 154] Q. Counsel for Bevan?

A. Not of the exact time.

Q. Nor of the place?

Now, in your commitment appears the following:

"As appears in the foregoing transcript of said proceedings, the said Bevan then and there refused to answer as hereinbefore set forth, and for the reasons therein stated, and the undersigned, a notary public, in each instance ordered the said witness to answer which he refused to do; and the undersigned, a notary public, then and there for the said contempt of the said C. N. Bevan, in refusing to answer each question, and refusing to produce said books, papers and documents, ordered and adjudged that he be imprisoned in the county jail until he submit to testify in the premises."

Now, isn't it a fact, Mr. Purcell, that at the time Mr. Bevan was present at the taking of his deposition, at the time he refused to answer questions, that you then and there adjudged that he was in contempt and ordered that he be committed?

(Objection; overruled.)

A. No, sir, I didn't at the exact moment.

Q. It was some hours later that you signed this commitment, wasn't it?

A. It was immediately at the conclusion of the taking of the depositions that commitments were decided upon and gotten up.

Q. It was some hours after Mr. Bevan had left the office before you signed this commitment?

A. Yes, sir.

Q. And you had no hearing, heard no arguments, received no evidence on the question as to whether Mr. Bevan

was in contempt or whether he had any justification or reasonable ground for refusing to answer?

(Objection; overruled; exception.)

A. No, sir.

Q. You served upon Mr. Bevan no notice, either verbal or in writing, of any charge which you were making against him, before you signed this order for his commitment?

(Objection; overruled; exception.)

A. No, sir.

[fol. 155] Mr. Fraser: May I have objections and *objections*, without interrupting?

Judge Lloyd: Yes, you may.

Mr. Welles: Your commitment further reads: "The undersigned, a notary public, adjudges that said questions and said books, papers and documents therein referred to are material to the issues in said cause as appears from the petition filed herein, copy of which is hereto attached and marked Exhibit A"; did you in fact hold any hearing, hear any arguments, give counsel for Mr. Bevan or for the defendants in the Woolson case any opportunity to be heard by you on the question as to whether these documents or questions were material to the issues?

A. No, sir.

Q. Did you in fact even read the petition in the Woolson Spice case?

A. Yes, sir.

Q. Are you a lawyer?

A. No, sir.

Q. Did you undertake to form a deliberate judgment upon the legal question as to whether the questions asked were material to the issues raised by the petition in the Woolson case?

A. No, sir.

Q. You simply signed the paper presented to you by counsel for the plaintiff in that case, is that right?

A. Yes, sir.

Q. I show you paper marked Plaintiff's Exhibit No. 8, is that the original subpœna signed by you under date of June 7th for John W. Koehrman?

A. Yes, sir.

Q. It is a fact that because Mr. Koehrman did not appear before you on June 7th that you then signed and delivered to the sheriff a writ of attachment, the original of which appears as a part of the sheriff's return?

(Objection; overruled; exception.)

A. No, sir.

Q. At whose request did you sign the writ of attachment for Mr. Koehrman, which is a part of the sheriff's return?

A. At the request of Mr. Fraser.

Q. What was the reason for signing it?

A. Because he didn't appear on the thirteenth day of June.

[fol. 156] Q. Is it a fact, Mr. Purcell, that on the morning of June 13, 1932, after you had undertaken to begin these depositions, that I stated before you, as shown by your transcript, without waiving any rights or submitting themselves to the jurisdiction of the notary, Mr. Koehrman will come over here and meet with you gentlemen whenever you are through with Mr. Bevan, who is now here?

A. Yes, sir.

Q. And was there, to your knowledge, any request thereafter made that Mr. Koehrman should come over that afternoon?

A. There was a request made that I issue an order of attachment immediately for Mr. Koehrman.

Q. You issued the order of attachment immediately upon that statement being made?

A. At the conclusion of the depositions.

Q. You didn't issue it right that morning, then?

A. Yes, sir.

Q. You didn't issue it right that morning then?

A. Yes, sir. As soon as we took the recess until afternoon.

Q. You issued the attachment for Mr.——

A. I am sure the attachment was in the hands of the sheriff before eleven thirty a. m.

Q. As far as you know, no further request was made that Mr. Koehrman should come there, except as you undertook to enforce his attendance by this writ of attachment?

A. Yes, sir.

Q. Is this Exhibit No. 9 the subpœna which you issued for Robert A. Stranahan?

A. It is one of the subpœnas.

Q. That is the one dated June 7th?

A. Yes, sir.

Q. Is the writ of attachment which is attached to the sheriff's return and marked Plaintiff's Exhibit No. 10 in the Stranahan case here, is it the one which you issued for the arrest of Mr. Stranahan?

A. Yes, sir.

Q. We offer in evidence each and all of the exhibits which have been called to the attention of Mr. Purcell, making an offer of each one separately.

(Objection; exception.)

Q. You were employed not only as a notary public but [fol. 157] also as a stenographer in the taking of these depositions of these three men whose petitions for habeas corpus are here, were you not?

A. Yes, sir.

Q. And you were acting as both notary and stenographer?

A. Yes, sir.

Q. Is it a fact that the amount of your compensation as a stenographer taking these depositions is dependent upon the number of pages of your notes which you transcribe and deliver to counsel for plaintiff?

A. Dependent upon the number of pages which we transcribe and deliver to all counsel.

Q. To any counsel, including counsel for the plaintiff?

A. Yes, sir.

Q. Do you receive any per diem as notary from counsel?

A. No, sir.

Q. Have no arrangement of that sort?

A. No, sir.

Q. Your compensation is contingent on the extent to which they testify before you?

A. Yes, sir.

Q. And the extent to which you transcribe the testimony, including the exhibits?

A. Yes, sir.

Q. And your employment as stenographer was by Messrs. Fraser, Hiett, Wall & Effler?

A. Yes, sir.

Q. In the taking of these depositions, I mean?

A. Yes, sir.

Q. What is your rate of compensation per page of typewritten transcripts of depositions or exhibits?

A. Based on the number of words. Twenty-five cents a hundred words, based on the statute.

Q. For the original copy?

A. Yes, sir.

Q. And you make a charge for furnishing carbons?

A. Yes sir.

Q. What rate?

A. The party ordering the original pays for their carbon copy ten cents a folio and opposing counsel pays fifteen cents.

Q. Were you in fact directed by Mr. Fraser or one of his firm to prepare an original typewritten transcript of these depositions?

A. I was directed to transcribe the testimony.

[fol. 158] Q. In typewriting?

A. Yes, sir.

Q. And to deliver how many copies to his office?

A. Deliver one carbon to his office and one carbon to Mr. Jackson.

Q. What were you to do with the original?

A. The original I took it for granted is to be kept in my office until signed and filed.

Cross-examination.

By Mr. Fraser:

Q. Mr. Purcell, before this morning, at any time in the proceedings, was any objection made by counsel for these defendants to your competency or qualifications?

A. Not to me.

Q. In your hearing?

A. Not that I know of.

Q. At the time of the taking of the testimony was anything said by Mr. Welles or any of counsel for defendants in any way questioning your qualifications or fairness or ability?

A. No, sir.

Q. In addition to employment by us to transcribe this testimony, were you also employed by counsel for the defendants to furnish them certain copies?

A. Yes, sir.

Q. Has that been done?

A. Yes, sir.

Q. Except to be paid by them for these copies?

A. Yes, sir.

Q. Practice in the taking of depositions is this, is it not, a deposition is taken and certain fees are taxed for the taking of the original?

A. Yes, sir.

Q. And returned and taxed as costs in the case and in many instances the counsel calling you advance those costs to you?

A. Yes, sir.

Q. Has that been the universal practice?

A. Yes, sir.

Q. How long have you been engaged in this work?

A. Sixteen years.

Q. Before issuing any of these writs of arrest or commitment, did you or did you not consult one of the judges of the Common Pleas Court of this county?

A. Yes, sir.

[fol. 159] Q. Which judge?

A. Judge Gosline.

Q. Were the writs issued after consultation with him?

A. Yes, sir.

Q. At the time that you were shown and had knowledge, personal knowledge of the original deposition notice served upon and acknowledged by Tracy, Chapman & Welles, were you told by me that service was also being made upon the Irving Trust Company's agent in Toledo?

A. Yes, sir.

Q. Were you also told that the original notice would be in the mail the next day?

A. I don't recall that.

Q. You never have seen that original notice?

A. No, sir.

Q. Acknowledged by them?

[fol. 160] Redirect examination.

By Mr. Welles:

Q. You don't mean that yon filed any formal application with the Court of Common Pleas for instructions or advice as to whether you should issue these writs of attachment or commitment?

A. No, sir.

Q. You didn't give counsel for defendant an opportunity to be heard and present any views they had as to why attachment or commitment should not issue?

A. No, sir.

Q. You simply went over and told Judge Gosline in substance that Mr. Fraser had asked you to issue writs of attachment or commitment or both and that because there was an application for injunction pending before him you wanted to find out whether it was all right to issue such writ?

A. In substance, that is it.

Q. He said, in substance, that the mere pendency of the application did not amount to one and you were at liberty to perform whatever your duties were in the premises?

A. Yes, sir.

Judge Williams: Was an attachment issued for the two witnesses who did not appear?

A. Yes, your Honor.

Q. And arrested under the writ of attachment?

A. Yes, your Honor.

Witness dismissed.

Mr. Welles: May it be conceded that Mr. Bevan, if called as a witness, would testify that he is in good health and expects to be present at the trial of the case of Clara Sielcken Schwarz v. The Woolson Spice Company in the Court of Common Pleas if and when it is tried, and resides in this county.

Mr. Fraser: Yes, I think he will testify to the same subject matter in his deposition, of course with our reservation of objection.

Mr. Welles: And the same thing as to Mr. Koehrman?

Mr. Fraser: Yes, with the same reservation.

Mr. Welles: We offer in evidence the several stipulations with respect to what the petitioners would testify to on these subjects.

[fol. 161] Mr. Fraser: Mr. Welles, will you stipulate that the young man who served this notice would testify that it was served upon Mr. Dexter, the man who appears to be the authorized agent of the Irving Trust Company?

Mr. Welles: You say you have a letter saying this was handed to Mr. Dexter?

Mr. Fraser: I have a statement over the telephone that this was served upon Mr. Dexter and he signed it, placed his signature on there acknowledging service.

Mr. Welles: I think we ought to have him here.

Mr. Fraser: I will make my professional statement that as soon as we can we will call him, bring evidence to show that. Mr. Welles, you don't question the signature of your firm appearing upon the original notice?

Mr. Welles: No.

Mr. Fraser: Exhibit No. 6.

Mr. Welles: No.

Thereupon RAYMOND T. JACKSON, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fraser:

Q. Your name, please?

A. Raymond T. Jackson.

Q. You are a lawyer, Mr. Jackson?

A. Yes, sir.

Q. Member of what firm?

A. Member of the firm of Baker, Hostetler, Sidlo & Patterson of Cleveland.

Q. Their offices in the Union Trust Building?

A. Yes, 1956 Union Trust Building, Cleveland, Ohio.

Q. Have you been active in the preparation and filing of this law suit?

A. I have.

Q. And did you take part in the preparation of the various notices and subpœnas for depositions in this case?

A. Well, I was in contact with the preparation and was [fol. 162] asked to see that the notices be prepared. As far as our firm was concerned the work was physically done by Mr. Morley in cooperation with your office.

Q. Are you in a position to testify whether or not these depositions are being taken in good faith or in bad faith?

(Objection; overruled; exception.)

A. I am.

Q. What is the fact?

A. The depositions are being taken in good faith.

(Objection; overruled; exception.)

Q. What is the fact as to whether or not they will or will not be used in the trial of this Schwarz case?

(Objection; overruled; exceptions.)

A. Depositions are being taken with the intention that they shall be transcribed and filed in the Common Pleas Court of this county and that the depositions will be used by the plaintiff if any occasion under the statute should arise which will permit their use and if the witnesses, particularly those called for cross examination under the statute, testify to the truth.

Cross-examination.

By Mr. Welles:

Q. Mr. Jackson, it is a fact, is it not that the proposition has been made to you several times by counsel for certain of the defendants, including the three petitioners here, that you should agree that the demurrer in the Court of Common Pleas should be first heard before a deposition should be taken, so that we might know whether there is any right on anybody's part to take anybody's deposition?

A. I don't know whether any proposition of that kind exactly was made. I can state the facts as I understand [fol. 163] them, if you want me to do it.

Q. I would like to have you state whether, in substance, the suggestion was not made that we should hear the demurrer before taking the depositions?

A. I will say this, that counsel for the defendants sought an agreement to postpone the taking of the depositions until——

Mr. Welles: I object to his rambling around here and go into an irrelevant controversy in which he can make this speech he is trying to make.

A. A suggestion was made.

Q. You say it was made, a suggestion was made by me to you?

A. Yes.

Q. And declined by you?

A. That is right.

Q. And is it not a fact that we stated to you that we were willing to submit that demurrer immediately, at any time suiting the court's convenience and your convenience?

A. You so stated yesterday to me, Mr. Welles.

Q. Didn't we say, so state, at the time we were before Judge Gosline that we were intending to file a demurrer which we would submit?

A. You stated you intended to file a demurrer before Judge Gosline on June 6th and that you would be glad to expedite the hearing of the motion when and if it should be filed.

Q. It is a fact, is it not Mr. Jackson, that you first attempted to take these depositions by means of serving with the summons a notice to take depositions?

A. Well, they were served the same day. My understanding is that the summons were served first, I wasn't there.

Q. But they were entrusted to the sheriff to be served at or about the same time?

A. My understanding is that after the summons had been issued in the suit and delivered to the sheriff of this county, he was then given notice of taking depositions and certain subpœnas and directed to serve them in a certain way, [fol. 164] first the summons and then the notices and then the subpœnas. I wasn't here but that is my understanding.

Q. They were to be served upon the defendants direct, not upon counsel?

A. That is right, no counsel had appeared for them Mr. Welles.

Q. And they were served with or at approximately the same time, the subpœnas duces tecum, on the witnesses Bevan and Koehrman?

(Objection.)

Q. In order to shorten the thing, may it be admitted that the first attempt to take depositions in this case by plaintiff consisted of causing to be served upon certain of the defendants on the same day the summons was served upon those defendants, a notice to take depositions, service being made upon the second of June and notice to take depositions for the sixth of June, and that upon Bevan and Koehrman there were served by the sheriff at or about the same

time, at least on the same day, subpœnas duces tecum for the production of books and papers before the notary on June 6th.

Mr. Fraser: If that stipulation includes the service on the Irving Trust Company in substantially the same way, yes. I understand the order was first, service of summons upon the resident defendants, then notices to take depositions and in the instance of Mr. Bevan, who is not a defendant, he was served with a subpœna duces tecum after the summons on the defendants had been served and notices to take depositions. In Koehrman's, he was served first with summons, then with notice to take depositions, then with a subpœna duces tecum. This stipulation is made with the reservation.

Mr. Welles: There is no stipulation, then, because Mr. Fraser's additional language is quite contrary with what has been found in the Court of Common Pleas, and we can not agree with it. We will be glad to have the sheriff called and present the exact facts, but we do not think it is material.

[fol. 165] Judge Lloyd: And we agree with you.

Mr. Fraser: Mr. Jackson, referring to the cross examination with respect to any agreement made on June 6th with respect to hearing or taking depositions and filing and hearing of the demurrer, tell the court the substance of that talk?

(Objection; overruled; exception.)

A. On June 6th at the hearing before Judge Gosline it was suggested that the hearing of that pending motion be continued, and asked counsel if they could not agree on some method of going forward and in talking with Mr. Welles after the suggestion from Judge Gosline, I stated that we would be willing to postpone the consideration of the pending matter and go forward on the following Monday, June 13th, taking the depositions at Mr. Fraser's office that date having been suggested in conference by Judge Gosline. Mr. Welles asked for some time to confer with some one and then told me that that date would be acceptable and that no objection would be made that any demurrer was pending if the one should be filed, or any exceptions taken to the taking of the depositions, and with that conversation we said we would issue the new subpœnas and notices which are the ones involved in this proceeding.

Motion to strike out answer as irrelevant, overruled, exception.

[fol. 166] Thereupon GEORGE D. WELLES testified as follows:

Mr. Wall: Will you state the substance of the conversation between you and Mr. Jackson on June 6th, regarding the time of taking the depositions?

A. Judge Gosline suggested a recess, and then invited us into his room and suggested we agree upon some date for taking these depositions. He finally said it ought to go about a week, he thought. I told him and Mr. Jackson was present, that we would consider it and let him and Mr. Jackson know. We did consider and consult and my arrangement with Mr. Jackson was this. I said to Mr. Jackson, in substance, that obviously we must preserve any rights we had to object to these depositions, but whether there was a delay or whether there was not a delay, we would waive no rights, we were going to rely upon every right we had and expected to file a demurrer, and that we expected to rely upon the fact that there was a demurrer pending. Mr. Jackson said to me, in substance, "does that mean you will object to the witness testifying at all, that you won't let them testify at all on the ground you have a demurrer pending?" and I said we wouldn't waive that objection, but these two witnesses, Koehrman and Bevan will appear and will submit to answering some questions, what questions or how many I wouldn't now say, but we shall reserve all rights. I afterwards went back to Mr. Jackson, before we went, a moment or two afterwards, and said to him I didn't want any misunderstanding about this, "I want you to understand we will waive no objection that we have."

Mr. Fraser: My statement as to what occurred there is in the depositions and on file. I don't think it is at all material.

Mr. Welles: If Mr. Fraser's statement is considered, I want Mr. Wall's statement considered also, if it is to be material.

Thereupon the court recessed for the noon hour, to reconvene at 1:30 o'clock p. m.

Mr. Welles: With the court's permission we would like to [fol. 167] reopen our evidence for the purpose only of offering one New York Court of Appeals decision and a section of the New York Statutes which we think bear upon the subject.

Judge Lloyd: Very well, you may put it in.

Mr. Fraser: Subject to our objection.

Mr. Welles: Your objection isn't because we are not proving the New York statute by some New York attorney?

Mr. Fraser: No.

Mr. Welles: We offer in evidence the opinion of the Court of Appeals of New York in the case of Harrington, Admr., etc., respondent, v. Eugene M. Keteltas, et al., appellants, 92 New York, beginning at page 40 and ending on page 50, called Exhibit No. 11, and we also offer from the New York Civil Practice, Cahill, 1927, the following subsection 5 of Section 20 of the Surrogate's Court Act.

Mr. Fraser: Objection and exception.

Mr. Welles: You aren't objecting to the manner of proof?

Mr. Fraser: No.

Mr. Welles: "The Surrogate in or out of court as the case may be has power: 5. To require by order an executor, administrator, testamentary trustee or guardian, subject to the jurisdiction of his court, to perform any duty imposed upon him by statute or by the surrogate's court under authority of the statutes."

Thereupon Raymond Adamski, being first duly sworn, testified as follows:

Direct examination.

By Mr. Fraser:

Q. What is your name, please?
A. Raymond Adamski.
Q. Where do you live?
A. 2601 Tate Avenue, Cleveland, Ohio.
Q. Are you employed somewhere?
A. Yes, sir.

Q. Where?

A. Law firm of Baker, Hostelter, Sidlo & Patterson.

[fol. 168] Q. What is your job?

A. Messenger.

Q. How long have you been there, how long have you worked there?

A. About a year and a half.

Q. Raymond, I show you paper which has been marked Defendants' Exhibit No. 1 in this case, did you ever see that?

A. Yes, sir.

Q. In connection with your work in Cleveland? Where did you first see it?

A. Mr. Morley handed it to me and told me to serve it on Mr. John Dexter.

Q. How many copies did he give you?

A. One original and one copy.

Q. Where did you go with them?

A. To the Society for Savings Bank Building.

Q. Whom did you inquire for?

A. I went to the guard at the Society for Savings Bank and asked for Mr. John Dexter. He told me there was a bank meeting and he would not be back until twelve, so I waited until about 12:15 and decided I would go to lunch and come back and catch him in, and I came back, I think it was about one o'clock, and I was just a few minutes late, he had gone out to lunch, and I went back and told Mr. Morley and said I would stop in and catch him on my way to court, and I went to his office then and the guard told me he was in and he pointed Mr. Dexter out to me and told me to go right over to him, so I went over to him and handed him the papers. At first I addressed him as Mr. Dexter, is this Mr. Dexter and he said yes and I handed him the papers. He looked them over and examined them and I told him to sign the copy and keep the original.

Q. Did he sign the copy?

A. Yes, sir.

Q. Did you see the name, J. H. Dexter, was that put on in your presence, Raymond?

A. Yes, sir.

Q. By whom was it signed?

A. By John H. Dexter.

Q. Was that all that occurred at that time?

A. Yes, sir.

Q. You left with him the original?

A. Yes, sir.

Q. And brought this with you and returned it to the office?

A. Yes, sir.

[fol. 169] Q. Since serving that paper, have you taken any steps to be more sure that it was Mr. Dexter who signed the paper?

A. Mr. Reeder took me down yesterday afternoon and introduced me to Mr. Dexter and it was the same man I served. He admitted it and said "are you the young man who served the papers?" and I said I was.

Witness dismissed.

COLLOQUY

Mr. Fraser: There are three papers I wanted marked as exhibits. If your Honors please, I offer in evidence a copy of Exhibit No. 4, being the original summons and return of the sheriff of Cuyahoga county of service upon the Irving Trust Company. For the sake of the record, if one is to be made, we desire to substitute a copy. And Defendants' Exhibit No. 3, which is a certified copy of the annual report returned to the Tax Commission of Ohio by The Irving Trust Company for 1931, certified over the signature of the secretary.

(Objection; overruled; exception.)

Mr. Fraser: And Defendants' Exhibit No. 2, which is a certified copy of the report rendered by the Irving Trust Company to the same body for the year 1932.

(Objection; overruled; exception.)

Mr. Welles: On the hearing yesterday, as I recall it, early in Mr. Purcell's examination I asked him in substance whether it wasn't a fact that he had signed the first set of subpœnas for the witnesses before the petition had been filed or any summons served, that is those calling for their appearance on June 6, 1932, and the court at that time ruled that that was immaterial and I don't think I made an offer to prove. I should like to offer to prove

that if permitted to answer he would say he signed these subpœnas before the petition was filed or summons issued.

Judge Lloyd: If I remember correctly, you stopped by saying you didn't think it was material and as I remember I said we agreed with you, and with that it was dropped. We want you to have in whatever you think you should have in here.

[fol. 170] Mr. Welles: Perhaps counsel can stipulate.

Mr. Fraser: Reserving our objection to the materiality, we stipulate that he would so testify.

Mr. Welles: And it is agreed that any evidence offered by either side in any one of the three cases shall be considered as having been offered in all three cases.

Mr. Fraser: Subject to the same objections.

Plaintiff and defendant rest.

The foregoing, together with the exhibits hereto attached, namely, Plaintiff's Exhibits Nos. 1, 2, 3, 3a, 3b, 3c, 4, and 6 to 11, inclusive, and Defendants' Exhibits Nos. 1 to 4, inclusive, (no exhibit being numbered 5 and no exhibit number 5 being offered by either party or received in evidence) contains all the evidence given, offered or received by the court on the trial of the above-entitled action and proceedings.

Thereafter on the twenty-second day of June, 1932, the court found and adjudged in favor of the defendant and respondent, Joseph Zimmerman, as sheriff of Lucas county, and against the petitioner, and ordered the writ of habeas corpus issued herein discharged and the petitioner remanded to the custody of the respondent, to all of which petitioner in open court objected and excepted. Within three days thereafter petitioner filed in this court his written motion for a new trial of this cause, for the reasons therein set forth. Said motion having thereupon come on for hearing and having been argued and submitted to the court, was overruled by the court; to which action and order of the court overruling his said motion, petitioner in open court duly excepted.

Order Settling Bill of Exceptions

And now comes the petitioner, by his counsel, and presents to the court this, his bill of exceptions, taken at said

trial of said cause, and prays that the same may be settled, allowed, signed and sealed by the court, and ordered made a part of the record in said cause; all of which is accordingly done on the twenty-third day of June, A. D. 1932.

Harry W. Lloyd, Presiding Judge, S. S. Richards, Roy H. Williams, Judges, Court of Appeals.

[fol. 171] Received this bill of exceptions on this twenty-third day of June, A. D. 1932.

Harry W. Lloyd, Presiding Judge, S. S. Richards, Roy H. Williams, Judges, Court of Appeals.

[fol. 172] Statement re Plaintiff's Exhibit 1

Plaintiff's Exhibit 1 (petition in case of Clara Sielcken-Schwarz, plaintiff, vs. The Woolson Spice Company, et al., defendants) appears in full at pages 108 to 129, supra, in this Transcript and is here incorporated by reference thereto, as fully as if repeated verbatim.

[fols. 173 & 174] Plaintiff's Exhibit 2

In Court of Common Pleas of Lucas County, Ohio

No. 131,925

Clara Sielcken-Schwarz, Plaintiff,

vs.

The Woolson Spice Company, et al., Defendants

Demurrer of the Defendant, Franklin H. Biggs

Now comes the defendant Franklin H. Biggs and demurs to plaintiff's petition on the ground that it appears on its face:

1. That the plaintiff has not legal capacity to sue;

2. That the petition does not state facts which show a cause of action;

3. That there is a misjoinder of parties defendant;

4. That there is a defect of parties plaintiff;

4-a. That there is a defect of parties defendant;

5. That separate causes of action against defendants are improperly joined;

6. That the action was not brought within the time limited for the commencement of such actions;

7. That several causes of action are improperly joined.

Marshall, Melborn, Marlar & Martin and Tracy Chapman & Welles, Attorneys for said Defendant.

[fols. 175 & 176] PLAINTIFF'S EXHIBIT 3

"Certificates of qualification under Ohio General Code Sections 178 and 183 issued to The Irving Trust Company by the Secretary of State of Ohio, March 28, 1930." Omitted in printing.

[fol. 177] PLAINTIFF'S EXHIBIT #3A

(Notary's Order of Commitment of C. N. Bevan.)

(PLAINTIFF'S EXHIBIT #3B

Plaintiff's Exhibit #3B (order of attachment of appellant, Robert A. Stranahan) appears in full at pages 102 to 103, supra, of this Transcript and is here incorporated by reference thereto, as fully as though repeated verbatim.

PLAINTIFF'S EXHIBIT #3C

(Notary's Writ of attachment of John W. Koehrman.)

[fols. 178-182] PLAINTIFF'S EXHIBIT 4.

"Statements of Irving Trust Company, filed with Secretary of State of Ohio, on March 28, 1930, under Ohio General Code Section 178 and 183." Omitted in printing.

[fol. 183] PLAINTIFF'S EXHIBIT 6

COURT OF COMMON PLEAS

No. 131,925

STATE OF OHIO,
Lucas County:

CLARA SIELCKEN-SCHWARZ, Plaintiff,

vs.

THE WOOLSON SPICE COMPANY et al., Defendants

NOTICE TO TAKE DEPOSITIONS

The defendants will take notice, that on Monday the 13th day of June, A. D. 1932, the plaintiff above named will take the depositions of sundry witnesses to be used as evidence on the trial of the above cause, at the office of Fraser, Hiett, Wall and Effler, 710 Home Bank Building, Toledo, in the County of Lucas, the State of Ohio, between the hours of nine-thirty (9:30) o'clock A. M. and six o'clock P. M. of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

June 6, 1932. Dated June 6, 1932.

Fraser, Hiett, Wall & Effler, Attorneys for Plaintiff.

Service of the above notice is acknowledged, and proof of the official character of the officer before whom the said deposition may be taken is hereby waived.

Tracy, Chapman & Welles, Attorneys for the Woolson Spice Company, John W. Koehrman, Franklin H. Biggs, Frank D. Stranahan, and Robert A. Stranahan.

STATE OF OHIO,
County of Lucas, ss:

R. B. Swartzbaugh, being first duly sworn, says that on Monday, June 6, 1932, at about two thirty o'clock P. M., he served a copy of the within deposition notice upon Mr. Leroy Eastman, one of the Administrators of the Estate of William A. Brigham, deceased, and a member of the law firm

of Smith, Baker, Effler and Eastman, which firm are attorneys for Ammi F. Mitchell and Leroy Eastman, Administrators of the Estate of William A. Brigham, deceased.
[fol. 184] Mr. Eastman acknowledged service of notice verbally but declined to do so in writing, and declined to enter any appearance.

(Signed) R. B. Swartzbaugh.

Sworn to before me and subscribed in my presence this 7th day of June, 1932. (Signed) L. A. Wilhelm, Notary Public, Lucas County, Ohio. (Notarial Seal.)

[fol. 185] PLAINTIFF'S EXHIBIT #7

(Subpœna Duces Tecum on C. N. Bevan.)

PLAINTIFF'S EXHIBIT #8

(Subpœna Duces Tecum on John W. Koehrman.)

PLAINTIFF'S EXHIBIT #9

Plaintiff's Exhibit #9 (subpœna upon appellant, Robert A. Stranahan) appears in full at pages 104 to ——, supra, of this Transcript, and is here incorporated by reference thereto, as fully as though repeated verbatim.

PLAINTIFF'S EXHIBIT #10

Plaintiff's Exhibit #10 (order of attachment of appellant, Robert A. Stranahan) appears in full at pages 102 to 103, supra, of this transcript and is here incorporated by reference thereto, as fully as though repeated verbatim.

PLAINTIFF'S EXHIBIT #11

(Opinion of Court of Appeals of New York in the case of George C. Harrington, Administrator, v. Eugene M. Keteltas et al., 92 N. Y. 40.)

[fol. 186] DEFENDANT'S EXHIBIT 1

THE STATE OF OHIO,
Lucas County, ss:

IN THE COURT OF COMMON PLEAS WITHIN AND FOR THE COUNTY OF LUCAS AND STATE OF OHIO

Case No. 131,925

CLARA SIELCKEN-SCHWARZ, Plaintiff,

against

THE WOOLSON SPICE COMPANY et al., Defendants

The defendant, Irving Trust Company, Executor, will take notice, that on Monday, the 13th day of June, A. D. 1932, the above named plaintiff will take the depositions of John W. Koehrman, C. N. Bevan, Robert A. Stranahan, Frank D. Stranahan and sundry witnesses to be used as evidence on the trial of the above entitled cause, at the office of Fraser, Hiett, Wall & Effler, 710 Home Bank Building, in the City of Toledo, County of Lucas and State of Ohio, between the hours of 9:30 o'clock A. M. and 8 o'clock P. M., of said day, and that the taking of the same will be adjourned from day to day, between the same hours, until they are completed.

Baker, Hostetler, Sidlo & Patterson, Attorneys for Plaintiff.

I acknowledge service of the above notice, by copy, this 7th. day of June, A. D. 1932.

J. H. Dexter, Agent for Defendant, Irving Trust Company, Executor.

[fols. 187–189] DEFENDANT'S EXHIBIT 2

"State of Ohio Tax Return, 1932, Foreign Corporation; Annual Report of The Irving Trust Company, New York City, New York." Omitted in printing.

[fols. 190–192] DEFENDANT'S EXHIBIT 3

"State of Ohio Tax Return, 1931, Foreign Corporation, Annual Report of The Irving Trust Company, State of New York." Omitted in printing.

[fol. 193] DEFENDANT'S EXHIBIT 4

THE STATE OF OHIO,
Lucas County, ss:

To the Sheriff of Cuyahoga County:

You are commanded to notify Irving Trust Company, a foreign corporation as executor of the last will and testament of Herman Sielcken, deceased, that it has been sued by Clara Sielcken-Schwarz in the Court of Common Pleas of Lucas County, and that unless it answer by the second day of July, 1932, the petition of said plaintiff against it filed in the clerk's office of the said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the thirteenth day of June, A. D. 1932.

Witness Geo. E. Hardy, clerk of our said court, and the seal thereof hereto affixed, at Toledo, this second day of June, A. D. 1932.

Geo. E. Hardy, Clerk. M. E. Theuerkauff, Deputy Clerk.

THE STATE OF OHIO,
Cuyahoga County, ss:

Received this writ June 2, 1932, and pursuant to its command, on the second day of June, 1932, at 2:20 p. m. I served the defendant, Irving Trust Company, a foreign corporation, as executor of the last will and testament of Herman Sielcken, deceased, by delivering to John H. Dexter, the duly authorized and designated managing agent of said defendant within this state, and the person duly authorized and designated as provided by law upon whom process against said corporate defendant may be served within this state, a copy of the summons with all endorsements thereon.

John M. Sulzmann, Sheriff. Jas. M. Gallagher, Deputy.

[fol. 194] IN COURT OF APPEALS OF LUCAS COUNTY, OHIO

C. A. No. 2691

Ex Parte C. N. BEVAN

C. A. No. 2692

Ex Parte JOHN W. KOEHRMAN

C. A. No. 2693

Ex Parte ROBERT A. STRANAHAN

June 22nd, 1932

In Habeas Corpus

Messrs. Tracy, Chapman & Welles and Messrs. Marshall, Melhorn, Marlar & Martin for petitioners.

Messrs. Fraser, Hiett, Wall & Effler and Messrs. Baker, Hostetler, Sidlo & Patterson for respondents.

OPINION

WILLIAMS, J.:

These actions, founded on applications for writs of habeas corpus, are brought to secure the discharge of certain witnesses who were committed by a notary public for refusing to appear and to produce certain books and for refusing to testify in the taking of depositions in an action for equitable relief brought by Clara Sielcken-Schwarz, plaintiff, against The Woolson Spice Company and other defendants in the court of common pleas of Lucas County, Ohio. The petition in that cause was filed June 2, 1932, and summons was issued and served upon all of the defendants except Marion A. Miller, who could not be found within the county. On the same day, notice of taking depositions on behalf of plaintiff was served upon the same defendants, but no depositions were taken under this notice. A new notice was served upon the same defendants on June 6th, 1932, for the taking of depositions on June 13, 1932. Subpœnas to appear and testify and produce certain books and records were served upon the petitioners Bevan and Koehrman, and a simple subpœna upon the petitioner

Stranahan. Bevan appeared on June 13, 1932, and answered a few questions, but refused to answer others. He further refused to produce books and records described in his subpœna. Both Koehrman and Stranahan disobeyed [fol. 195] the subpœnas and failed to appear. For contempt in refusing to answer questions and in refusing to produce books, papers and documents, the notary public ordered that Bevan be imprisoned in the county jail until he should submit to testify, and he was held in custody under this order of the notary at the time he sued out the writ of habeas corpus. Attachments were issued for Koehrman and Stranahan and they were arrested and held thereunder at the time the writs of habeas corpus were sued out for their release.

Many reasons are presented why the petitioners should be discharged, and we will discuss these questions in their order.

In the first place it is contended that the questions asked the witness Bevan were not material. In the action brought in the court of common pleas the plaintiff charged certain of the defendants with conspiring to fraudulently acquire the stock of Herman Sielcken in The Woolson Spice Company at a price far below its true value by wrongfully ousting him as president during his temporary stay in Germany and unlawfully causing the stock to be sold. Many of the questions put to the witness Bevan, which he refused to answer, were proper and material, and well calculated to elicit testimony tending to prove the allegations of the petition, and the books and records required to be produced by the subpœna duces tecum served upon him would undoubtedly, if produced, have a material bearing on the matters under inquiry. This contention is therefore not well-founded.

It is also contended by petitioners that the petition filed in the common pleas court does not state a cause of action and the plaintiff does not have legal capacity to sue. As to the sufficiency of the petition, that is properly a question for the determination of the court in which the action is pending. However, in our judgment, depositions may be taken as a rule even though the petition does not state a cause of action, for it is not necessary that there should be an existing, as distinguished from a potential, issue of fact. It has even been held that they may be taken while

error proceedings are pending in the reviewing court. [fol. 196] Fairchild v. Lake Shore Electric Railway Co., 101 Ohio St., 261.

As to the legal capacity of plaintiff to sue, there are numerous authorities to the effect that where a personal representative of the decedent's estate refuses to bring an action for the collection of assets, an heir or devisee may bring the action and make the personal representative a party defendant.

24 C. J., 797, Sec. 1981;
11 R. C. L., 262, Sec. 297;
See annotations in 22 L. R. A., 458 and
20 Amer. & Eng. Anno. Cases, 96.

The subpœna duces tecum did not require the production of private and privileged papers, so far as the evidence discloses, and were not so indefinite that the parties upon whom they were served were justified in entirely ignoring them, nor is it a justification for refusing to obey a subpœna or to give testimony that witnesses are in good health and expect to be present at the trial.

In re Berger, 13 Ohio App., 206; affirmed 101 Ohio St., 512;
14 Ohio Jurisprudence, 10, Sec. 5;
Mathias vs. Poe, 20 Court of Appeals Opinions, Sixth District, unreported, 276.

The evidence adduced on hearing in this court shows that the depositions were being taken in good faith and we can not say that there was any ulterior motive or improper purpose in taking them. Section 11526, G. C., gives either party the right to commence taking testimony by deposition at any time after service upon the defendant, and this right has been recognized by our Supreme Court and no party should be deprived of it without good cause. In re Rauh, 65 Ohio St., 128.

The petitioners also make the novel contention that in attempting to punish for contempt the notary exercised judicial power in violation of Sec. 1 of Art. IV, Sec. 8 of Art. II and Section 32 of Art. II of the Constitution of Ohio, that Sections 11510, 11511 and 11512, G. C., are unconstitutional, if construed to give the notary power so to [fol. 197] adjudicate, that such attempted adjudication being made in the absence of the petitioner, without notice

to him, or hearing, and without him being present or represented by counsel, or having opportunity to know of the charge against him, was in violation of the Constitution of Ohio and the 14th amendment to the Constitution of the United States, and that the notary public was disqualified to sit in judgment upon the petitioners by reason of his personal pecuniary interest. It is a complete answer to the contention so made by the petitioners that the notary public, in committing the witness to jail for refusing to answer questions and in issuing an attachment for the witnesses who refused to respond to subpœna, does not exercise judicial power.

DeCamp vs. Archibald, 50 Ohio St., 618;
Benckenstein vs. Schott, 92 Ohio St., 29, 38.

Marion A. Miller was not served with process and is not a party to the suit, and may never be. In fact, there is no good reason why the cause may not be tried in the court of common pleas without obtaining service on Miller, as he does not seem to be a necessary party. However that may be, depositions may be used against parties who were served with notice and upon trial the depositions may be received against all defendants, if the one not receiving notice of the taking of them waives objection. Ryan vs. Conner, 40 Ohio St., 368.

At any rate, the plaintiff might properly proceed to take depositions, although Miller had not been served with notice.

Many of the questions raised would, if decided, require this court to anticipate decisions of the court of common pleas. Questions of the sufficiency of pleadings are, in the first instance at least, properly questions for the determination of the court in which the pleadings are filed. We can not decide in advance questions made in the court in which the original action pends, and what has been said is by way of argument only.

[fol. 198] We have no hesitancy in reaching the conclusion that the contentions of the petitioners are not well-founded and that the petitions should be dismissed.

Petitions dismissed.

Lloyd and Richards, JJ., concur.

Approved:

(Seal) Roy H. Williams, Judge.

[fol. 199] Certificate of lodgment omitted in printing.

[fol. 200] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 201] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed March 20, 1933

The appellant in the above entitled cause states that the points upon which he intends to rely in this court in this case are as follows:

1. The Supreme Court of Ohio erred in holding that the General Assembly of Ohio did not violate any provision of the Federal Constitution in the enactment of Ohio General Code Sections 11510, 11511 and 11512, and in not finding and adjudging that said sections, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment which provides that no State shall "deprive any person of life, liberty, or property without due process of law".

2. The Supreme Court of Ohio erred in finding and adjudging that Ohio General Code Section 11514, which provides that a witness imprisoned by an officer under Ohio General Code Sections 11510, 11511 and 11512, may, after being imprisoned, apply to a judge of the Supreme Court, Court of Appeals, Common Pleas or Probate Court, of Ohio, who may discharge such witness if it appears that his imprisonment is illegal, affords due process of law to the appellant, who was arrested and deprived of his liberty [fol. 202] by a notary public under said Sections 11510, 11511 and 11512, and erred in not holding that said Sections 11510, 11511 and 11512, construed together with Section 11514, are in conflict with and violate the provisions of Sec-

tion 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, in that they deprive appellant of his liberty and property without due process of law, contravening that part of the Fourteenth Amendment to the Constitution of the United States which provides that no state "shall deprive any person of life, liberty, or property without due process of law".

3. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511, 11512, and 11514, and each of them, are constitutional and do not deny the appellant due process of law, and erred in not finding and adjudging that said sections and each of them are in conflict with and violate the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and are null and void, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property without due process of law", in that (a) such sections as construed by the Supreme Court of Ohio, purport to authorize and empower a notary public in the course of the taking of depositions, at will to commit and imprison a witness, who under the law of Ohio may lawfully refuse to give evidence not pertinent to the issues made or tendered by the pleadings, for contempt in failing or refusing to appear and answer questions or produce documentary evidence, without conferring upon such notary public, or upon any judicial tribunal, the power judicially to hear and determine, before the commitment and imprisonment of the witness, the question of the materiality, relevancy and competency of the evidence demanded and the guilt or innocence of the witness of the alleged contempt, the only opportunity for a judicial hearing and determination of the guilt or innocence of the witness so imprisoned being an independent collateral action brought by the witness after his imprisonment, and in which he assumes the burden; and in that (b) [fol. 203] no opportunity is afforded by said sections, or by the law of Ohio, for submitting fundamental questions arising under the Constitution of the United States and as to the jurisdiction of the notary public to the determination of a competent judicial tribunal before the witness is

declared to be guilty of contempt and imprisoned by the order of the notary public.

4. The Supreme Court of Ohio erred in not finding and adjudging that the operation of Ohio General Code Sections 11510, 11511 and 11512, and each of them, as applied to the facts of this case, is in conflict with and violates the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property without due process of law", in that no provision is made by said sections or by the law of Ohio for a hearing by the notary public, before whom depositions are being taken for use in a civil cause pending in a state court before such notary finds and adjudges, or attempts to find and adjudge, a person to be guilty of contempt and commits such person to jail, or for a notice of such hearing to one charged with having been guilty of contempt, and no opportunity is afforded to persons so charged to appear and defend in person or by counsel, and in that said sections provide, or attempt to provide, that the notary public might commit this appellant for contempt, without notice of any hearing to this appellant, and without providing or affording an opportunity for this appellant to be present at a hearing and to defend in person or by counsel, before finding and adjudging said appellant to be guilty of contempt and issuing an order of commitment confining this appellant in the county jail.

5. The Supreme Court of Ohio erred in not finding and adjudging that the attempted adjudication by the notary public, before whom depositions were being taken for use in a civil cause pending in a state court, that any questions that might be propounded to appellant were material to any issue in the case in which it was attempted to take said [fol. 204] depositions, and his attempted adjudication that appellant was in contempt, and the issuing of an order of attachment under which appellant was arrested and deprived of his liberty, all in the absence of the appellant and without notice to him or to his counsel, and without an opportunity for him first to know the charges against him or to have a hearing thereon, were in violation of appel-

lant's rights under Section 1 of the Fourteenth Amendment to the Constitution of the United States and were null and void, contravening that part of said amendment which provides in part that no state "shall deprive any person of life, liberty, or property without due process of law".

6. The Supreme Court of Ohio erred in not finding and adjudging tha. Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections and each of them, as applied to the facts in this case, are in conflict with and violate the provisions of the Fourteenth Amendment to the Constitution of the United States in that they attempt and purport to confer on notaries public arbitrary power, at their own will, and without regard to discretion in the legal sense of the term, to order or to refuse to order that questions propounded to witnesses be answered, and to commit or to withhold commitment as for contempt of witnesses who refuse to answer questions propounded to them and ordered to be answered by said notaries public, without regard to the materiality, relevancy or competency of such questions.

7. The Supreme Court of Ohio erred in not finding and adjudging that Ohio General Code Sections 11510, 11511 and 11512, and each of them, are in conflict with and violate the provisions of Section 1 of the Fourteenth Amend- [fol. 205] ment to the Constitution of the United States, in that they attempt to confer upon notaries public, who under the laws of Ohio are ministerial executive officers vested with no power to hear and determine, the peculiarly and inherently judicial power to imprison summarily as for alleged contempt of them, contravening that part of said amendment which provides that no state shall "deprive any person of life, liberty, or property without due process of law".

8. The Supreme Court of Ohio erred in holding that Ohio General Code Sections 11510, 11511 and 11512, and each of them, and the operation of said sections and each of them, as applied to the facts in this case, do not deny this appellant due process of law and are not unconstitutional, repugnant to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States in that

as construed by the Supreme Court of Ohio, said sections purport to authorize and permit the attachment and imprisonment of this appellant by a notary public who, as in this case, was selected and employed by, and the continuance of whose employment was at the will of, the party seeking to take depositions for use in a civil action pending in a state court, the said notary public's compensation being by law directly governed by the extent of the evidence the witness (this appellant) might be required to give, and the said notary public having a direct, substantial, personal pecuniary interest in the taking of the deposition and in coercing the witness (this appellant) to testify; and in that the said notary public was thereby disqualified from determining whether this petitioner was guilty of contempt and from issuing any order of attachment against the appellant and bringing about appellant's arrest and detention.

[fol. 206] 9. The Supreme Court of Ohio erred in not finding and adjudging that the notary public ordering appellant's attachment had a direct, substantial, personal pecuniary interest in the taking of appellant's depositions for use in a civil cause pending in a state court, and in attempting to coerce and compel appellant to testify and in finding and adjudging this appellant guilty of contempt and issuing said order of attachment, and in not finding and adjudging that said notary public was disqualified and without jurisdiction so to act and adjudge, or to cause appellant's attachment and detention, by reason of the fact that said notary was selected, employed and paid by the plaintiff in the alleged pending suit in which it was attempted to take appellant's deposition, said alleged judgment and order of commitment being made at the request of the plaintiff in said alleged pending suit, and said notary public's employment being upon such terms that its extent and continuance and his continued compensation and the amount thereof were contingent upon and directly governed by procuring and compelling the continued taking of such deposition by means of coercion by such judgment of contempt and order of attachment, so that said notary public's acts in so adjudging and bringing about the appellant's arrest and detention were a denial of due process of law, in violation of Section 1 of the Fourteenth Amendment

to the Constitution of the United States of America and were null and void, contravening that part of said Fourteenth Amendment which provides that no state shall "deprive any person of life, liberty, or property without due process of law".

Appellant further states that only the following parts of the records as filed in this court, need be printed by the Clerk for the hearing of this case:

Title of paper	Record page
1. Return of Clerk of the Supreme Court of Ohio	1
2. Petition for Appeal	2–4
3. Assignment of Errors	6–12

[fol. 207]

4. Statement particularly disclosing the basis upon which appellant contends that the Supreme Court of the United States has jurisdiction to review the judgment of the Supreme Court of Ohio	14–20
5. Order allowing appeal	22–23
6. Citation and proof of service	25
7. Stipulation as to Transcript of Record on Appeal	27–31
8. Statement to Respondent-Appellee re paragraph 3, Rule 12, of the Supreme Court of the United States and proof of service	33–34
9. Appellee's Statement making against the Jurisdiction asserted by the Appellant	36–58
10. Supersedeas and Appeal Bond	60–61
11. Petition-in-error, in Supreme Court of Ohio	62–67
12. Entry of Appearance, in Supreme Court of Ohio	68
13. Journal Entry substituting Sheriff	69
14. Motion for Stay of Execution and Advancement of Cause	70–71
15. Order of Supreme Court of Ohio granting said motion for stay of execution and advancement of cause	75
16. Supersedeas bond, in Supreme Court of Ohio	76
17. Judgment of Supreme Court of Ohio	77
18. Journal Entry substituting Sheriff	78

Title of paper	Record page
19. Opinion of Supreme Court of Ohio and Certificate of Reporter	79–93
20. Transcript of docket entries in Court of Appeals of Lucas County, Ohio	94–95
21. Transcript of journal entries in Court of Appeals of Lucas County, Ohio	96–98
22. Petition for Writ of Habeas Corpus	99–101
23. Notary's Order of Attachment	102–103
24. Subpœna on Robert A. Stranahan	104
25. Amendment to Petition for Writ of Habeas Corpus	105–107
[fol. 208]	
26. Petition for Equitable Relief, in case "Clara Sielcken-Schwarz, plaintiff, v. The Woolson Spice Company, et al., defendants, number 131925 in Common Pleas Court of Lucas County, Ohio	108–129
27. Writ of habeas corpus and Sheriff's Return	130
28. Page containing reference to "Writ and Commitment Papers" referred to in Sheriff's Return; Sheriff's Return to Order of Attachment; notary's return of service of subpœna	131–132
29. Recognizance	133
30. Motion for New Trial in Court of Appeals, Lucas County, Ohio	134–137
31. Bill of Exceptions	138–171
32. Page containing reference to plaintiff's Exhibit 1 (Petition for Equitable Relief)	172
33. Demurrer of the defendant, Franklin H. Biggs	173
34. Print only title of Plaintiff's Exhibit 3, as follows: "Certificates of qualification under Ohio General Code Sections 178 and 183 issued to The Irving Trust Company by the Secretary of State of Ohio, March 28, 1930"	175
35. Page containing title of plaintiff's Exhibit 3A; reference to plaintiff's Exhibit 3B (order of attachment of Robert A. Stranahan); title of Plaintiff's Exhibit 3C	177

Title of paper	Record page
36. Print only title of Plaintiff's Exhibit 4, as follows: "Statements of Irving Trust Company, filed with Secretary of State of Ohio, on March 28, 1930, under Ohio General Code Section-178 and 183"	178
37. Plaintiff's Exhibit 6 (Notice to take Depositions) and proof of service	183–184
38. Page containing Titles of Plaintiff's Exhibits 7, 8 and 11; references to Plaintiff's Exhibit 9 (subpœna upon Robert A. Stranahan) and Plaintiff's Exhibit 10 (order of attachment of Robert A. Stranahan)	185
39. Defendant's Exhibit 1 (Notice to take Depositions)	186
40. Print only title of Defendant's Exhibit 2, "State of Ohio Tax Return, 1932, Foreign Corporation; Annual Report of The Irving Trust Company, New York City, New York"	187
[fols. 209 & 210]	
41. Print only title of Defendant's Exhibit 3, "State of Ohio Tax Return, 1931, Foreign Corporation, Annual Report of The Irving Trust Company, State of New York"	190
42. Defendant's Exhibit 4 (Summons and Return of Service)	193
43. Opinion of Court of Appeals, Lucas County, Ohio	194–198
44. Certificate of Lodgment	199
45. Authentication of Record	200

Crary Davis, Geo. C. Welles, Counsel for Appellant.
Stuart S. Wall, Thomas J. Lynch, Harry S. Bugbee, of Counsel.

Dated March 17, 1933.

ACKNOWLEDGMENT OF SERVICE

Due service, and receipt of copy, of the appellant's foregoing Statement of Points to be relied upon and Designation of the Parts of the Record to be printed are acknowledged.

Newton D. Baker, Raymond T. Jackson, John C. Morley, Harold W. Fraser, Counsel for Appellee.

March 18th, 1933.

[fol. 211] [File endorsement omitted.]

Endorsed on cover: File No. 37,483. Ohio Supreme Court. Term No. 786. Robert A. Stranahan, appellant, vs. David M. Krieger, as Sheriff of Lucas County, Ohio. Filed March 16, 1933. File No. 37,483.